Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JEROME HENRY EVENSON,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, v. JEROME HENRY EVENSON, Appellant.	Arizona Supreme Court No. CR-01-0438-PR Court of Appeals Division One No. 1 CA-CR 00-0621 Maricopa County Superior Court No. CR 97-09901 **ORDER**

On consideration of the trial record, the evidence, the briefs, and the arguments of counsel, a majority of the court, consisting of Vice Chief Justice McGregor, Justice Berch, Judge Espinosa, and Chief Justice Jones, has determined that review of the case was improvidently granted.

IT IS THEREFORE ORDERED vacating the grant of review as improvident and dismissing the case.

DATED this 24th day of March, 2003.

Charles R. Jones
Chief Justice

Justice FELDMAN, dissenting from the order, gives his reasons as follows.

The publication contains nothing obscene or

pornographic and portrays no sexual act, unless one believes that depicting the female breast or advertising "personal" services is either obscene, pornographic, or sexually explicit. Material similar to that in *The Beat* is readily available to minors and everyone else in movies and on television, particularly cable television, as well as in magazines and newspapers. Thus, I cannot agree that these exquisitely tacky ads for exotic dance clubs and undescribed personal services may support a criminal conviction, absent some evidence that minors have been or could be harmed by the material. In fact, in this case, there was no evidence that any minor ever saw any of the material or would even be allowed in any of the clubs.

TO:

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JEROME HENRY EVENSON, Appellant.	1 CA-CR 00-0621 DEPARTMENT E **OPINION** Filed 10-30-01

Appeal from the Superior Court in Maricopa County

Cause No. CR 97-09901

The Honorable Frank T. Galati, Judge

AFFIRMED

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R Y A N, Judge

¶1 Jerome Evenson appeals his convictions and sentences on thirteen counts of displaying, selling, or offering to sell from a vending machine material that is harmful to minors. See Ariz. Rev.Stat. ("A.R.S.") § 13-3513 (Supp. 1997). Evenson has raised several issues on appeal. However, because only our resolution of the constitutional challenges to A.R.S. § 13-3513 merits publication, we have addressed the remaining issues in a separate memorandum decision. See ARCAP 28(g); Ariz. R. Sup. Ct. 111(h); State v. Benak, 199 Ariz. 333, 334, ¶ 4, 18 P.3d 127, 128 (App. 2001).

¶2 We conclude that A.R.S. § 13-3513 is narrowly tailored to achieve a compelling governmental interest and therefore does not violate Evenson's First Amendment rights. We further conclude that § 13-3513 satisfies the requirements of equal protection and due process. Therefore, we affirm.

BACKGROUND

¶3 The primary issue before us is whether A.R.S. § 13-3513 is an unconstitutional restriction on freedom of speech. See U.S. Const. amend. I; Ariz. Const. art. 2, § 6. Accordingly, we must "make an independent examination of the whole record" to assure ourselves there has not been a "forbidden intrusion on the field of free expression." New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (citation omitted)

¶4 Evenson is the owner and publisher of The Beat, an adult oriented weekly publication. He has published The Beat in Arizona since 1964. The tabloid-style newspaper contains news, editorials, and photographs, but primarily

consists of sexually oriented advertisements for adult bookstores, numerous "escort" and "model"services, and the like. Dozens of these ads contain photographs of partially nude and completely nude women posing in a variety of positions.[1] However, no genitalia are displayed in any of the photographs. Additionally, The Beat contains "strictly personal" classified ads for persons seeking various sexual encounters with others.

¶5 In 1997, the Arizona Legislature passed A.R.S. § 13-3513. The statute reads as follows:

> A. It is unlawful for any person to knowingly display, sell or offer to sell in any coin-operated or slug-operated vending machine or mechanically or electronically controlled vending machine that is located in a public place, other than a public place from which minors are excluded, any material that is harmful to minors as defined in § 13-3501.
>
> B. It is a defense in any prosecution for a violation of subsection A that the defendant has taken reasonable steps to ascertain that the person is eighteen years of age or older and has taken either of the following measures to restrict access to the material that is harmful to minors:
>
> 1. Required the person receiving the

[1] In the past, the police have used these ads to obtain leads on unlicensed "escort" services, presumably during the course of prostitution investigations.

material that is harmful to minors to use an authorized access or identification card to use the vending machine and has established a procedure to immediately cancel the card of any person after receiving notice that the card has been lost, stolen or used by persons under eighteen years of age or that the card is no longer desired.

2. Required the person receiving the material that is harmful to minors to use a token in order to use the vending machine.

C. A person who violates this section is guilty of a class 6 felony.

¶6 "Harmful to minors" is defined at A.R.S. § 13-3501 (1989). The definition was adopted by the Arizona Legislature in 1974 to conform with the test for obscenity promulgated by the United States Supreme Court in Miller v. California, 413 U.S. 15, 24-26 (1973). See S.B. 1227, Summary Analysis (Ariz. 1974). Section 13-3501 requires the average adult to apply contemporary state standards with respect to what is suitable for minors. For an item to be harmful to minors, it must depict "nudity, sexual activity, sexual conduct, sexual excitement, or sadomasochistic abuse" in a patently offensive way, and it must appeal to the prurient interest and lack serious literary, artistic, political, or scientific value for minors when taken as a whole. Id. Actually furnishing such material to minors has been against the law in this state for some time. See A.R.S. § 13-3506(A) (1989).[2]

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[2] Additionally, putting material that is harmful to minors on "public display" is illegal in Arizona. See A.R.S. § 13-3507 (A) (1989) - It appears that Evenson was not charged under this provision because law enforcement officials interpret "public display" to mean that the

¶7 Although not entirely clear from the record, it appears that part of the impetus for the passage of A.R.S. § 13-3513 was a February 1997 newspaper article recounting complaints from mothers of young children about the availability of the Arizona Swinger and the Pleasure Guide, two competitor publications often sold in vending machines near those of The Beat.[3] After passage of the statute, both the Swinger and the Pleasure Guide began blocking out any nudity in the photographs they published.

¶8 Shortly after § 13-3513 became effective, Phoenix vice officers received a telephone complaint from a man named Alfred Nelson concerning copies of The Beat being sold from a vending machine on Seventh Avenue. A vice detective met with Nelson, who showed the detective a copy of the August 22-28, 1997 issue (Vol. 33, No. 29), which Nelson believed was inappropriate for minors. The detective then obtained a search warrant, and on August 27, 1997, officers from Phoenix, Mesa, and Chandler seized as evidence fifteen of the 200-plus area vending machines selling The Beat at 50-cents per copy.[4]

¶9 The vice detective who seized the eight vending machines impounded in Phoenix testified that they were

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harmful material itself must be publicly displayed. In other words, A.R.S. § 13-3507 is interpreted to apply to most nationally distributed pornographic magazines because of the nature of their covers. The cover of Evenson's publication, in contrast to its inside pages, does not depict such material.

[3] There is little legislative history because A.R.S. § 13-3513 was passed as a "strike everything amendment" to an unrelated bill. See Minutes of Senate Committee on the Judiciary, at 20 (March 25, 1997). However, it appears that one motivation for the legislation was to treat the sale of "adult" oriented newspapers and "adult" magazines the same way. Id.

[4] Between twenty and fifty copies are delivered to each vending machine every week and, according to Evenson, between 8,000 and 12,000 copies of The Beat are sold during that time.

"so well dispersed around the Valley, all you have to do is drive any direction if you are looking for them, and you'll find them." The detective said that two of the machines he impounded were located near high schools. In fact, Sunnyslope High School appears in the background of a photograph of a seized vending machine, and one of the two machines that completely sold out before the warrant could be executed was near a "Christian high school." A third machine was next to a Dairy Queen, a fourth was outside a pizza restaurant, and all eight machines seized in Phoenix were in close proximity to residential areas.

¶10 Similarly, a Mesa sergeant testified that one of the five vending machines he seized was in front of a post office "a little bit down the way" from a church and a school; another was near other churches; a third machine was across from the Mesa Community College; and all were located short distances from residential areas. It also appears that one of the two vending machines seized in Chandler was positioned within blocks of three different schools. Throughout Phoenix, Mesa, and Chandler, many machines were placed near convenience stores.

¶11 The grand jury indicted Evenson on fifteen counts of violating A.R.S. § 13-3513. Evenson's first trial ended in a hung jury. A second jury convicted him on thirteen counts, but acquitted him on the other two, apparently because two of the vending machines had sold out by the time the officers impounded them. The trial court placed Evenson on three years probation and imposed substantial fines. This appeal followed.

DISCUSSION

I. First Amendment

¶12 Evenson contends that A.R.S. § 13-3513 violates

the First Amendment to the United States Constitution and Article 2, § 6 of the Arizona Constitution.[5] The constitutionality of a statute is a matter of law that we review de novo. *State v. Korzuch*, 186 Ariz. 190, 192, 920 P.2d 312, 314 (1996).

¶13 Statutory limitations on free speech are subject to varying levels of scrutiny, depending on whether the limitation is content-based or content-neutral. Here, the parties agree that A.R.S. § 13-3513 is a content-based restriction, and as such is subject to strict scrutiny. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (federal statute limiting sexually explicit programming on cable television is content-based restriction subject to strict scrutiny); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) *("Reno I")* (ban on sending obscene or indecent material over Internet is a content-based restriction); *Sebago, Inc. v. City of Alameda*, 259 Cal. Rptr. 918, 923-24 (Cal. Ct. App. 1989) (restricting sites of vending machines for adult newspapers is a content—based restriction). Under strict scrutiny analysis, content-based regulations must be "narrowly tailored to promote a compelling Government interest." *Playboy*, 529 U.S. at 813 (*citing Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). In the free speech context, a statute is narrowly tailored "if [the Government] chooses the least restrictive means to further the articulated interest." Sable, 492 U.S. at 126 (1989). In addition, content-based restrictions are "presumptively invalid" and the state bears the burden of rebutting that presumption. *Playboy*, 529 U.S. at 817 (*quoting R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992)).

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[5] Article 2, section 6 of the Arizona Constitution states:

> Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

¶14 Evenson argues that A.R.S. § 13-3513 violates the First Amendment because the State presented no evidence that the statute addressed a compelling state interest. Specifically, Evenson contends that under the Supreme Court's decision in Playboy, the State was required to show that minors had purchased, possessed, seen, and were harmed by The Beat. Alternatively, Evenson argues that even if A.R.S. § 13-3513 furthers a compelling interest, the State has failed to prove that it is the least restrictive means of serving that interest.

¶15 The statute at issue in *Playboy*, section 505 of the Communications Decency Act of 1996 ("CDA"),[6] was designed to shield children from viewing or listening to discernable pictures and audio of sexually explicit cable television programs, which occasionally appeared on the screens of non—subscribers through a phenomenon called "signal bleed." *Id.* at 806. Section 505 required cable television operators providing sexually oriented programming either to "fully scramble or otherwise fully block" those channels, or to limit their transmission to times when children were unlikely to be viewing.[7] Id. Given the expensive cost of converting existing cable television technology to more advanced scrambling technologies, the majority of cable operators opted to comply with § 505 by limiting the transmission of sexually-explicit programming to the hours between 10:00 p.m. and 6:00 a.m. Id. Apparently adopting the trial court's conclusion that § 505's alternatives to a time-block were not economically "practical," Id. at 808-10, 812, the Court concluded that, in effect, § 505 resulted in a 'nationwide

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[6] The CDA is Title V of the Telecommunications Act of 1996. See Pub. L. No. 104—104, 110 Stat. 133 (1996) (codified at scattered sections of 18, 28 and 47 U.S.C.).

[7] By administrative rule, the hours between 10 p.m. and 6 a.m. were thus designated. See 47 C.F.R. § 76.227 (1996).

daytime speech ban." Id. at 823.

¶16 In its analysis, the five-member majority emphasized that the government had failed to produce any "evidence of how widespread or how serious the problem of 'signal bleed' [was]." Id. at 819. In other words, "an actual problem" had not been shown. Id. at 822. However, the Court held § 505 unconstitutional because it was not the least restrictive means of addressing the signal bleed problem. Another provision of the CDA, § 504, allowed individual cable subscribers to request that unwanted transmissions be completely blocked at the cable operator's expense and was therefore more narrowly tailored than § 505. Id. at 823-24, 825-26.

A. Compelling State Interest

¶17 It has been repeatedly and explicitly held that states have "a compelling interest in protecting the physical and psychological well-being of minors" and that "[t]his interest extends to shielding minors from the influence of literature that is not obscene by adult standards." Sable, 492 U.S. at 126 (citing *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982)); see also Reno I, 521 U.S. at 869; *Denver Area Educ. Telecomms. Consortium, Inc.* v. FCC, 518 U.S. 727, 755 (1996); *FCC v. Pacifica Found.*, 438 U.S. 726, 749—50 (1978); *ACLU v. Reno*, 217 F.3d 162, 173 (3d Cir. 2000) *("Reno II")*, cert. granted, *Ashcroft v. ACLU*, 121 S. Ct. 1997 (May 21, 2001).

¶18 Despite these precedents, Evenson argues that, to establish a compelling interest under the Supreme Court's analysis in Playboy, the State was required to prove that children were actually exposed to The Beat's harmful

material.[8] He contends that the State presented no evidence of minors purchasing, seeing, or being harmed by exposure to The Beat. We, however, conclude that *Playboy* does not require such proof under the circumstances of this case.

¶19 As noted above, the statute in *Playboy* was struck down because it was not the least restrictive alternative -- not because the government lacked a compelling interest. *Playboy*, 529 U.S. at 827 ("The Government has failed to show that § 505 is the least restrictive means for addressing a real problem . . . .") Nevertheless, the Supreme Court did suggest that the State must present some minimal evidence that the statute addressed the admittedly compelling interest of protecting the physical and psychological well-being of minors. See id. at 822 (noting that although the Government is not required to compile a 10,000 page record to support every statute burdening speech, it must present more than "anecdote and supposition"); see also *Playboy Entm't Group, Inc. v. United States*, 30 F. Supp. 2d 702, 716 (D. Del. 1998) ("[T]he Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved.") (*citing Pacifica*, 438 U.S. at 748-50).

¶20 But *Playboy* does not, as Evenson suggests, demand proof that specific children were actually exposed to and harmed by sexually explicit material as a prerequisite to establishing a compelling interest. Rather, the proof required by Playboy is proof that the potential for harmful

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[8] However, we note that even after the Playboy decision, courts have found it self-evident "that the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards." *Reno II*, 217 F.3d at 173; see generally *United States v. Fox*, 248 F.3d 394, 401-02 (5th Cit. 2001) (government's interest in the area of child pornography not limited to the prevention of harm suffered by actual children participating in production of pornography, but extends to all children).

exposure to minors constitutes a real risk. See *Playboy*, 529 U.S. at 819 ("[T]here is no proof as to how likely any child is to view a discernable explicit image, and no proof of the duration of the bleed or the quality of the pictures or sound. To say that millions of children are subject to a risk of viewing signal bleed is one thing; to avoid articulating the true nature and extent of the risk is quite another."); id. (discounting videotaped evidence of signal bleed because "there is no discussion, for instance, of the extent to which any particular tape is representative of what appears on screens nationwide."); id. ("[T]he Government presented no evidence on the number of households actually exposed to signal bleed and thus has not quantified the actual extent of the problem of signal bleed.") (*quoting Playboy*, 30 F. Supp. 2d at 709) . Thus, the evidentiary deficiency noted in Playboy was not that the government had failed to prove that actual children had seen and been harmed by viewing signal bleed,[9] but rather that the government had failed to prove that signal bleed occurred often enough and with enough clarity so as to create a substantial likelihood that children were at risk for harmful exposure. Obviously, as the Court concluded, "[i]f television broadcasts can expose children to the real risk of harmful exposure to indecent materials, even in their own home and without parental consent, there is a problem the Government can address." Id. at 826-27.

¶21 Moreover, Evenson' s argument that actual exposure and actual harm must be proven is undermined by the Playboy decision itself. There the record contained evidence that one eleven-year old boy was exposed to sexually explicit signal bleed while attending a slumber party. See Id. at 820 (noting evidence); see also *Playboy*, 30 F. Supp. 2d at 710 n.ll, and accompanying text. But the

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[9] Indeed, as discussed in the following paragraph, in Playboy, the government did provide such evidence.

Court concluded that such evidence was merely "anecdotal" and was thus insufficient to establish the existence of an "actual problem." *Playboy*, 529 U.S. at 821-22. The Court's treatment of such evidence in Playboy supports our conclusion that the government's compelling interest in the physical and psychological well-being of minors is implicated by the risk of harmful exposure to minors generally rather than by the effect of any actual exposure on any individual minor.[10]

¶22 For several reasons, we conclude that, in contrast to the evidentiary deficiencies noted in Playboy, the State here provided both direct and circumstantial evidence that the unrestricted availability of The Beat creates a real risk of children being exposed to indecent materials. First, unlike the signal bleed at issue in Playboy, there is no question as to the duration or quality of the indecent images in The Beat because those images were printed in hard copy format. Cf. Playboy, 30 F. Supp. 2d at 716 (noting that

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[10] Amicus curiae also argues that actual children must be harmed. It relies on a recent Seventh Circuit case for the proposition that the government must have compelling grounds, and not merely plausible ones, to justify enforcement of A.R.S. § 13-3513. See Am. *Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001). In that case, manufacturers of video games sought to enjoin the enforcement of a city ordinance limiting minors' access to video games that depict violence. The Seventh Circuit noted that the city's claim that harm to its citizens through a minor's use of violent video games was not grounded in common sense. Id. at 579. The court therefore held that without evidence illustrating how violent video games were harmful to the consumer or to the public safety, the city failed to show a compelling interest. *Id.* But the court, *citing Ginsberg*, commented that such evidence was not required with respect to restrictions on sexual materials harmful to minors, noting that the Supreme Court "thought this a matter of common sense." Id. Therefore, we find Kendrick inapposite.

"[t]here is no evidence in this case that ... scrambled, garbled, intermittent signal bleed has a harmful potential similar to explicit pornography"). Thus, while any minor who tunes into a scrambled sexually explicit cable program may only see static or snow, see *Playboy,* 529 U.s. at 819, a minor who turns the pages of *The Beat* will, in every case, see sexually explicit images.[11] Consequently, the risk of harmful exposure to minors from the clear and unchanging sexually explicit images in *The Beat* is far greater than the risk of exposure to the scrambled, garbled, intermittent images occasionally resulting from signal bleed.

¶23 Second, unlike *Playboy,* in which there was "'no attempt at explanation or context," *Id.,* the State offered substantial circumstantial evidence that *The Beat's* unrestricted availability created a real risk of harmful exposure to minors. The evidence established (1) that *The Beat* was readily available for only fifty-cents at more than 200 unattended vending machines scattered throughout the Phoenix area; (2) that many of those machines were positioned near schools, convenience stores, and other places where minors congregate; (3) that one of the two machines that had completely sold out before police could impound it was near a high school; and (4) that virtually all of the seized machines were placed near residential areas. Thus, the evidence showed that material the jury found "harmful to minors" was readily available to minors, at

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[11] This case is, therefore, factually less analogous to *Playboy* and more analogous to those cases in which the state's compelling interest in protecting minors supported a state statute prohibiting the sale to minors of sexually provocative material, even though the material was not obscene by adult standards. See, e.g., *Ginsberg,* 390 U.S. at 639-43 (concluding that the state's compelling interest in protecting minors supported a state statute prohibiting the sale of "girlie" picture magazines to minors under seventeen, even though the magazines at issue were not obscene for adults).

minimal cost, with no adult supervision, and was located near schools, churches, convenience stores, and residential areas--all places where children congregate. Such evidence provides significant support for the conclusion that *The* Bear's unrestricted availability created a real risk of harmful exposure to minors. See State *v. Pettit,* 194 Ariz. 192, 197, ¶ 23, 979 P.2d 5, 10 (App. 1998) (noting that it is well settled that direct and circumstantial evidence have equal probative value).

¶24 Finally, the Court in *Playboy* noted that the government failed to account for a number of market-based solutions to signal bleed, such as "programmable televisions, VCR's, and mapping systems (which display a blue screen when tuned to a scrambled signal)," which are available to parents and "may eliminate signal bleed at the consumer end of the cable." 529 U.S. at 821. By failing to account for the impact of these solutions, the government made it "impossible to know how widespread the problem in fact is." *Id.;* see *also Id.* at 820 (noting that "[t]he Government made no attempt to confirm the accuracy of its estimate [regarding the number of homes exposed to signal bleed] through surveys or other field tests"). In contrast, such market-based solutions are not available with respect to sexually explicit newspapers such as *The* Beat, which are sold on public street corners to anyone with two quarters. *Cf. Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.").

¶25 Accordingly, in view of this evidence, we hold that the State provided adequate evidence that *The Beat's* unrestricted availability posed a real risk of harmful exposure, and thus supported the State's exercise of its compelling "independent interest in the well-being of its youth." *Reno I,* 521 U.S. at 865.

B. Less Restrictive Alternatives

¶26 Even though the State has a compelling interest in shielding minors from the material in *The Beat,* A.R.S. § 13-3513 may still be unconstitutional "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Id.* at 874. Evenson and Amicus Curiae argue that the State has failed to carry its burden of proof on this issue. Specifically, Amicus Curiae argues that §13-3506 is an equally effective, less restrictive alternative. Section 13-3506(A) states that "[i]t is unlawful for any person, with knowledge of the character of the item involved, to recklessly furnish, present, provide, make available, give, lend, show, advertise or distribute to minors any item that is harmful to minors.[12] We conclude that § 13-3506 is not an equally effective, less restrictive alternative for at least three reasons.

¶27 First, we fail to see how § 13-3506 is any less restrictive than § 13-3513. On the contrary, to the extent that the two statutes can be read to prohibit similar conduct, § 13-3506 is even more restrictive, subjecting Evenson to criminal liability not only for displaying, selling or making available material that is harmful to minors, but also for furnishing, presenting, providing, making available, giving, lending, showing, advertising, or distributing such materials to minors. More importantly, unlike § 13-3513, § 13-3506 contains no safe harbor provisions that would shield Evenson from criminal liability. The safe harbor provisions of § 13-3513 permit Evenson to place modified vending machines anywhere he chooses. In contrast, an

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[12] The statute was amended in 2001 to add "transmit" and "offer" to the list of conduct that is prohibited. The amendment does not affect our analysis. See 2000 Sess. Laws, ch. 189, § 25.

unmodified vending machine's location near a school could easily support a jury finding of recklessness under § 13-3506. Overall, enforcing § 13-3506 on *The* Bear, and other, similar publications, would chill far more speech than does § 13-3513.

¶28 Second, we are persuaded by the reasoning of the Ninth Circuit, which concluded that a California statute almost identical to A.R.S. § 13-3513 was narrowly tailored so as to be the least restrictive alternative to serve the state's compelling interest. There, the court found that "[g]iven the unusually easy availability of materials in these unsupervised newsracks," California's statute "'balanced the competing interests of protecting children from the harmful effects of consuming adult-oriented newspapers with the interest of adults in having access to those materials" by narrowly limiting children's ability to purchase such materials, while still allowing adults to purchase these materials. *Crawford v. Lungren,* 96 F.3d 380, 387 (9th Cir. 1996).[13]

¶29 Third, like the California statute at issue in *Crawford,* the Arizona legislature provided a "safe harbor" to prosecution under A.R.S. § 13-3513(B) (2). Unlike the safe harbor provisions deemed illusory in *Playboy* because

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[13] Evenson argues that a recent Ninth Circuit decision, *Alameda Books, Inc. v. City of Los Angeles,* 222 F.3d 719 (9th Cit. 2000), 'seriously backtracks" from the rationale of *Crawford.* Several factors compel us to disagree. First, and most importantly, *Alameda* addressed the secondary effects of a zoning ordinance. The Court in *Playboy* stated such cases are irrelevant to the question raised here because of the "lesser scrutiny afforded" in reviewing zoning regulations that target secondary effects of adult businesses. 529 U.S. at 815. Second, *Alameda* never discussed *Crawford.* Third, the Supreme Court granted *certiorari* in *Alameda Books.* See 33 U.S.L.W. 3585 (U.S. Mar. 5, 2001) (No. 00—799).

they were not economically practical, retrofitting *The* Beat's vending machines to accept tokens does not appear to be economically impractical. *Cf. Playboy,* 529 U.S. at 808-10, 812. A detective testified that the vending machines could be retrofitted to accept only tokens, for approximately $90 per machine. In other words, for a total cost of about $20,000, Evenson could have taken advantage of this safe harbor and equipped all 200-plus of the vending machines to accept tokens. This does not seem to be a particularly burdensome expense in light of the State's calculation that Vol. 33, No. 29 generated approximately $17,000 in gross advertising sales.[14] Moreover, many of Evenson's machines were near convenience stores, presumably ideal locations to sell the tokens to adults.

¶30 We are mindful that when a state seeks to restrict speech based on its content, the usual presumption of constitutionality afforded legislative enactments is reversed. *See Id.* at 816. However, we are also mindful that § 13-3513 does not impose an outright ban on this type of material. That § 13-3513 imposes a burden rather than a complete ban on Evenson's and others' First Amendment right is critical to, though not determinative of, our conclusion. We note that other courts have recognized the significance of total speech bans when rendering a content-based statute unconstitutional. See *Id.* at 823 ("nationwide daytime speech ban"); Reno *I,* 521 U.S. at 877 ("The breadth of the CDA's coverage is wholly unprecedented"); *Sable,* 492 U.S. at 128-29 ("There is no doubt Congress enacted a total ban on both obscene and indecent telephone communications.").

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[14] Evenson contested the State's estimates but refused to submit any evidence documenting his financial situation. He did, however, concede that he netted more than $2,000 per week from vending machine sales of the publication.

¶31 In cases involving content-based restrictions that burden rather than ban speech, courts have been more willing to uphold the regulation's constitutionality. See *Pacifica,* 438 U.S. at 733 (FCC declaratory order regulating a certain indecent radio broadcast upheld in part because the rule was not intended to place an absolute prohibition on indecent language); *Ginsberg,* 390 U.S. at 639 (New York law banning store owners from selling pornographic materials to minors upheld in part because adults could still buy the magazines); *Crawford,* 96 F.3d at 387-89 (statute nearly identical to A.R.S. § 13-3513 upheld in part because adults could "purchase the materials from alternative sources or in alternative ways."); People *v. Hsu,* 99 Cal. Rptr. 2d 184, 194 (Cal. Ct. App. 2000) (California statute banning the attempted distribution or exhibition of lewd material to a minor over the Internet deemed constitutional in part because adults could still disseminate the material to other adults and minors if no intention of seducing the minor was involved); see also *Playboy,* 529 U.S. at 838 (Breyer, J., dissenting) (describing § 505 of the CDA as a *"burden* on adult channel speech" rather than "an absolute ban").

¶32 We believe A.R.S. § 13-3513 places a burden rather than a ban on speech. It thus survives constitutional challenge because adults can still purchase *The Beat,* albeit from alternative sources or in alternative ways.

¶33 For these reasons, we conclude that A.R.S. § 13-3513 does not violate the constitutional protections in favor of free speech. The statute furthers a long—recognized, compelling state interest, and neither Evenson nor Amicus Curiae have suggested, nor do we find, any less restrictive alternative that is similarly practical and effective. See Reno *I,* 521 U.s. at 874.[15]

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[15] Amicus Curiae correctly points out that the Arizona Constitution

II. Equal Protection and Due Process

¶34 Evenson next makes several arguments suggesting that A.R.S. § 13-3513 is under inclusive, overbroad, vague, and arbitrary, so as to violate both equal protection and the requirements of due process. We address each argument in turn.

¶35 First, Evenson contends that the statute is under-inclusive because it does not regulate other purveyors of sexually-explicit material, such as those on television, radio, and the Internet. However, the Constitution does not require lawmakers to deal with every problem at once. See *Denver Area,* 518 U.s. at 757; 2 Chester James Antieau, *Modern Constitutional Law* § 30.01 (2d ed.1997) ("Lawmakers need not correct all problems of a like nature in order to correct some; they may proceed 'one step at a time.'").

¶36 Second, Evenson contends the statute is overbroad because it could possibly apply to reporters, editors, and others involved in the publishing industry. "'An overbroad statute is one designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment.'" State *v. Jones,* 177 Ariz. 94, 99, 865 P.2d

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provides greater free speech rights than the United States Constitution. See *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n,* 160 Ariz. 350, 354, 773 P.2d 455, 459 (1989) . That greater protection, however, lies in the Arizona Constitution's extension of free speech rights to cover not only speech limitations imposed by the government, but also speech limitations emanating from other sources. *Id.* Because speech limitations imposed by private actors are not at issue here, we conclude that our analysis adequately supports the constitutionality of § 13-3513 under Article 2, section 6, of the Arizona Constitution.

138, 143 (App. 1993) (quoting John E. Nowak et al., *Constitutional Law* ch. 18, § III, at 868 (2d ed. 1983); see *also* State *v. McLamb,* 188 Ariz. 1, 9, 932 P.2d 266, 274 (App. 1996). "[T]he overbreadth of a statute must not only be real, but substantial as well." *Proadrick v. Oklahoma,* 413 U.S. 601, 615 (1973).

¶37 Here, A.R.S. § 13-3513 makes it unlawful for any person to knowingly display, sell, or offer to sell material that is harmful to minors from unmodified vending machines. This language is clearly not meant to apply to journalists, reporters, and the like. See State *v. Cornish,* 192 Ariz. 533, 537, ¶ 16, 968 P.2d 606, 610 (App. 1998) (when analyzing statutes, we apply practical common sense constructions, not hyper-technical ones that would tend to frustrate legislative intent). Indeed, those professionals convey and edit information. They do not distribute or sell materials, activities the statute is clearly directed towards. Furthermore, nothing in the record, other than Evenson's allegations, suggests how far the statute could extend. In other words, even if the statute was overbroad, we are not convinced its reach would be substantial. See *McLamb,* 188 Ariz. at 10, 932 P.2d at 275 ("[T]here must be a realistic danger that the statute will *significantly* jeopardize recognized first amendment protections of individuals not before the court.").

¶38 Third, Evenson contends that the statute is overbroad because it fails to distinguish young children from older minors. He argues that young children lack the "sophistication" and money to buy papers from vending machines, and therefore the legislature should not have included them within the statute's protected class. According to Evenson, the legislature should have limited the statute to apply to only "those reasonably expected to have the age and maturity... to operate a vending machine."

¶39 We disagree with Evenson's factual assertion that

today's young children lack either the funds or the "sophistication" to purchase *The Beat* from a vending machine. See *Crawford,* 96 F.3d at 388 ("Any youth with a few coins can access the materials in question."). Because young children are also the most vulnerable and easily impressed, we also disagree that they should not have been considered within the statute's targeted classification. Moreover, because Arizona's statutory definition of "harmful to minors" expressly tracks the test for obscenity approved by the United States Supreme Court, we fail to see how it could be unconstitutionally overbroad. See *Miller,* 413 U.S. at 24-26.[16]

¶40 Finally, Evenson contends that the A.R.S. § 13-3513 is "fatally flawed" and "arbitrary and unreasonable" because it applies only to vending machines. He argues that this classification is "illogical" because it would not have been an offense to give his publication to a minor. Evenson' s contention that targeting vending machines is unreasonable fails because specific legislation exempting one kind of broadcaster from an obscenity statute does not violate the principles of equal protection. Ripplinger *v. Collins,* 868 F.2c1 1043, 1050-51 (9th Cir. 1989) (Arizona's exemption of cable channels from former state obscenity statute does not violate equal protection). Here, the statute is directed at one method of selling indecent materials and not at an entire broadcast medium. Thus, it is quite clear that singling out coin-operated vending machines does not violate equal protection. And Evenson's

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[16] For this same reason, we reject Evenson' s suggestion that A.R.S. § 13-3513 is unconstitutionally vague. A law violates due process and is void on its face if "it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Laurence H. Tribe, American Constitutional Law §* 12—31, at 1033 (2d ed. 1988) ; State *v. Western,* 168 Ariz. 169, 171, 812 P.2d 987, 989 (1991). .

suggestion that it would not have been an offense to give his publication away is simply erroneous. As already noted, A.R.S. § 13-3506 applies to persons who recklessly "furnish, present, provide, make available, give, lend, show, advertise or distribute to minors any item that is harmful to minors." Obviously, this stature would apply to a situation in which Evenson gave away copies of *The Beat* to children. His argument to the contrary is meritless, and we therefore reject it. See *State v. Altamirano,* 166 Ariz. 432, 437, 803 P.2d 425, 430 (App. 1990) (noting that courts avoid "statutory interpretation[s] that lead[] to absurd results which could not have been contemplated by the legislature"); State *v. Arthur,* 125 Ariz. 153, 155, 608 P.2d 90, 92 (App. 1980) ("[A] stature is to be given a sensible construction that will accomplish the legislative intent and at the same time avoid an absurd result.") . We therefore conclude that A.R.S. § 13-3513 comports with both equal protection and due process.[17]

CONCLUSION

¶41 We affirm Evenson's conviction based on three conclusions. First, the State adequately showed a compelling state interest by proving there was a real risk of children being exposed to *The* Beat. Second, A.R.S. § 13-3513 is the least restrictive means that is equally effective in keeping harmful materials sold from vending machines out of the reach of children, yet keeping such materials reasonably accessible to adults. Finally, we reject Evenson' s equal protection and due process arguments as meritless. We therefore affirm.

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[17] Amicus Curiae also argues that *The Beat* is not harmful to minors as a matter of law. But Evenson did not raise this issue. Amid are not allowed to inject new issues on appeal. State *v. Municipal Court (Cantrell),* 190 Ariz. 120, 121 n.l, 945 P.2d 1251, 1252 n.l (1997). We therefore decline to address this issue.

MICHAEL D. RYAN
Presiding Justice

CONCURRING:

ANN A. SCOTT TIMMER, Judge

JOHN C. GEMMILL, Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JEROME HENRY EVENSON, Appellant.	1 CA-CR 00-0621 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court) Filed 10-30-01

Appeal from the Superior Court in Maricopa County

Cause No. CR 97-09901

The Honorable Frank T. Galati, Judge

AFFIRMED

Janet Napolitano, Attorney General By Randall N. Howe, Chief Counsel, Criminal Appeals Section Attorneys for Appellee	Phoenix
Jones, Skelton & Hochuli, P.L.C. By A. Melvin McDonald Attorneys for Appellant	Phoenix
Jennings, Strouss & Salmon, P.L.C. By Stephen F. Lee Attorneys for Amicus Curiae, Arizona Civil Liberties Union	Phoenix

RYAN, Judge

¶1 Jerome Evenson appeals his convictions and sentences on thirteen counts of displaying, selling, or offering to sell from a vending machine material that is harmful to minors. See Ariz. Rev.Stat. ("A.R.S.") § 13-3513 (Supp. 1997). We addressed Evenson's First Amendment, equal protection, and due process challenges in a contemporaneous Opinion. The relevant facts and procedural history are discussed there. In this unpublished memorandum decision we address Evenson's claims of error with respect to his sentence, prosecutorial misconduct, denial of the right to a speedy trial, and denial of a requested jury instruction. For the following reasons, we find no error and thus affirm.

I. Sentencing

¶2 The trial court placed Evenson on three years probation and imposed fines totaling $104,000.00, plus surcharges.[1] Evenson contends that the fine of $8,000 per vending machine amounted to cruel and unusual punishment. We disagree. Trial courts possess broad discretion in sentencing matters and a reviewing court may find an abuse of that discretion when the sentencing decision is arbitrary and capricious. State v. Fillmore, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1995). While criminal fines are subject to Eighth Amendment analysis, a fine is excessive if it is "so disproportionate to the offense that it shocks public sentiment and affronts the judgment of reasonable people." State v. Wise, 164 Ariz. 574, 576, 795 P.2d 217, 219 (App. 1990).

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[1] The total amount levied amounted to $155,400 which the judge allowed Evenson to pay at a rate of $2,500 per month, an amount Evenson said he could afford.

¶3 We note that the trial judge did not impose any jail time on Evenson. He also let Evenson pay the fines in $2,500 installments, an amount Evenson said he could afford. Moreover, the judge gave sound reasons for his sentence:

> The community has a right to try to protect its children and I think, talking about being a parent -- I am in the same position -- it is impossible, it is close to impossible in today's society to try to shield your children from things you think are inappropriate. I have to turn off sports talk shows in the morning drive to work because my 14-year old daughter is in the car, sports talk shows, KOME or whatever it is. It's outrageous, I think, and a lot of people use that as mitigation for what you do. If you can't escape it on the radio, then why should we try to regulate what Mr. Evenson does?
>
> I think just the opposite. I think when the legislature and this jury by its verdict tries to protect children in the community, you have to take them seriously, and that's because of the special place that children are held in, and the law recognizes it. We have things called dangerous crimes against children where the penalties for doing those kind of things against children are astronomical compared to other crimes in the state. So the protection of children is something I have considered. Again, irrespective of what I think about your publication or what I think about the wisdom of the legislature, the effort has been made to protect children and to just dismiss it and say this isn't worth a felony, this isn't worth any jail time, this isn't worth a big fine, just everybody go home and be nice, I don't think that' s appropriate.

¶4 Finally, the State estimated that Evenson's gross advertising revenue from Vol. 33, No. 29 alone was over $17,000. See Wise, 164 Ariz. at 576, 795 P.2d at 219 (defendant's income proper consideration in imposing fine). Evenson contested this amount, but did not provide any documentation of his financial status to contradict the State's calculations. We therefore do not believe the court abused its discretion in imposing the fines that it did, nor do the fines amount to cruel and unusual punishment.

II. Prosecutorial Misconduct

¶5 Evenson next contends that the prosecution engaged in misconduct during his closing argument to the jury. The statement at issue is as follows:

> The verdict you send, and the State knows how difficult it is in this case, but the State is asking for a verdict. There are three verdicts that you could come back with.
>
> The first one would be a message to the State. You could find the defendant not guilty, and that would tell the State, I mean Mr. Romley, or whoever the county attorney is, could still say, I'm against pornography, but that doesn't matter, you can still find him not guilty, and what that would tell the state is don't prosecute it.
>
> But there are consequences to a verdict, whether it goes either way. The consequences are, first of all, probably will not enforce this statute, the statute probably will have no teeth.
>
> But the other consequence is that it will send a message, not just to Mr. Evenson, but to the Swingers, the Pleasure Guide, you've got free rein, do what you want.

And the problem with that is -- there was testimony about there are other publications that sell in stores or don't sell through vending machines that may have worse stuff.

A verdict of not guilty will send a message that those people who, instead of having some protection with adult control in the store, may start putting vending machines out for their stuff too, and you're going [sic] see lots and lots more of these.

¶6 Evenson did not object to this argument at trial but now claims it amounted to misconduct on the part of the prosecutor. Failure to object at the time of trial waives a claim on appeal absent fundamental error. State v. Jones, 188 Ariz. 388, 398, 937 P.2d 310, 320 (1997). Error is fundamental only when it is "clear, egregious, and curable only via a new trial." Id. (quoting State v. Gendron, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991)).

¶7 "Although advocates are ordinarily given wide latitude in closing argument, their comments must still be 'based on facts the jury is entitled to find from the evidence and not on extraneous matters that were not or could not be received in evidence. State v. Leon, 190 Ariz. 159, 162, 945 P.2d 1290, 1293 (1997) (quoting State v. Dumaine, 162 Ariz. 392, 402, 783 P.2d 1184, 1194 (1989)). In determining if a prosecutor's closing remarks are improper, courts consider: "(1) whether the remarks call to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." State v. Jones, 197 Ark. 290, 305, 91 37, 4 P.3d 345, 360 (2000) (quoting State v. Hansen, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988)), cert. denied, Jones v. Arizona, 121 S. Ct. 1616 (2001).

¶8 An argument could be made that by asking jurors to consider the effect their verdict would have on future actions of the county attorney, and on publishers of other sexually-explicit publications, the prosecutor called attention to matters the jury could not consider in deciding the case. However, Arizona courts have found analogous closing arguments by prosecutors permissible. See State v. Walker, 181 Ariz. 475, 482-83, 891 P.2d 942, 949-50 (App. 1995) ("[E]very one of you who's ever heard about the war on drugs and wanted to do anything about the war on drugs, this is your opportunity to see what is going on in the front battle lines . . . ."). Our supreme court has said that "arguments referring to the prevalence of crime, the duty of the jury, and the efforts of the police in combatting crime are not improper." State v. Sullivan, 130 Ariz. 213, 218-19, 635 P.2d 501, 506-07 (1981) ("[T]he State depends on people like you to send a message out to the pushers that this is not going to be permitted anymore and that's why we are here today, to convict the defendant of this."); State v. Jaramillo, 110 Ariz. 481, 483, 520 P.2d 1105, 1107 (1974) ("You will never ... have a better opportunity to do something about the drug problem, particularly about heroin sellers, than you've got here today in court."). Furthermore, we note that during trial, testimony showed that similar publications of The Beat were sold at vending machines and that this was the first prosecution under the new statute. Certainly, the jurors were already aware of the message their verdict would send before the prosecution made his closing arguments. Thus, we cannot say that the prosecutor's remarks rose to the level of fundamental error.[2]

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[2] Evenson also contends that we should review the actions of the Maricopa County Attorney to determine whether they merit reversal of his convictions. The County Attorney conducted a press conference at the scene of the first seizure of a vending machine. However, Evenson

III. Speedy Trial

¶9 Evenson also claims that his convictions should be reversed on speedy trial grounds because the court continued the matter forty days over his objection. See Ariz. R. Crim. P. 8.2 (every person shall be tried within 150 days of arrest or service of summons). The State argues that Evenson waived the issue by not raising it by special action. Although it is preferable to raise Rule 8 matters on special action, we cannot say Evenson waived the issue by not doing so. See State v. Vasko, 193 Ariz. 142, 147, ¶91 23-24, 971 P.2d 189, 194 (App. 1998). Nevertheless, it is clear that the trial court actually continued the matter for Evenson's benefit, as he had just informed the court that he was in the process of hiring a new lawyer and was not certain whether or not the new lawyer would conduct the trial. See Ariz. R. Crim. P. 8.4(a) (delays occasioned on behalf of defendant excluded from Rule 8.2 time limits) - Thus, Evenson's right to a speedy trial was not denied.

IV. Jury Instruction

¶10 Finally, Evenson claims the trial court erred in refusing to give the following jury instruction:

> If you are unable to agree on what the views of the

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did not raise this issue at trial. Hence, he has waived it absent fundamental error. *Gendron,* 168 Ariz. at 154, 812 P.2d at 627. Fundamental error is error that goes to the foundation of the case, takes from the defendant a right essential to his defense, and is of such magnitude that he could not have possibly received a fair trial. *State v. Hughes,* 193 Ariz. 72, 86, ¶ 62, 969 P.2d 1184, 1198 (1998) . Here, all we can discern from the record is that reporters were present at the scene during one of the vending machine seizures and that one of the vice officers present agreed that the situation was a "media circus." Prom this, we cannot say Evenson was deprived of a fair trial.

> average person are on the subject of prurient or patent offensiveness, then I instruct you to return a verdict of not guilty on all counts.

The trial judge rejected this proposed instruction stating that he did not think it "sensible." Nor do we. The Supreme Court has explicitly stated:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.

Hamling v. United States, 418 U.S. 87, 104-05 (1974) (emphasis added); see United States v. Easley, 927 F.2d 1442, 1449-50 (8th Cir. 1991) (quoting Hamling language and rejecting jury instruction identical to that proffered by Evenson). That the material in question would be considered "harmful to minors" to "the average adult applying contemporary state standards" is an element of the offense that is spelled out by the statute. There is no need for the jury to make a more specific determination. See State v. Grainge, 186 Ariz. 55, 59, 918 P.2d 1073, 1077 (App. 1996). That the jury returned a guilty verdict is sufficient to show thaiD each panel member found The Beat harmful to minors by contemporary state standards.[3]

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[3] Nor is there any need for expert testimony on the issue of whether material is harmful to minors. *State* V. *Hummer,* 184 Ariz. 603, 607, 911 P.2d 609, 613 (App. 1995).

CONCLUSION

¶11 Evenson's convictions and fines are affirmed.

MICHAEL D. RYAN, Presiding Judge

CONCURRING:

ANN A. SCOTT TIMMER, Judge

JOHN C. GEMMIL, Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

Arizona Rev. Stat. § 13-3513

A. It is unlawful for any person to knowingly display, sell or offer to sell in any coin-operated or slug-operated vending machine or mechanically or electronically controlled vending machine that is located in a public place, other than a public place from which minors are excluded, any material that is harmful to minors as defined in § 13-3501.

B. It is a defense in any prosecution for a violation of subsection A that the defendant has taken reasonable steps to ascertain that the person is eighteen years of age or older and has taken either of the following measures to restrict access to the material that is harmful to minors:

1. Required the person receiving the material that is harmful to minors to use an authorized access or identification card to use the vending machine and has established a procedure to immediately cancel the card of any person after receiving notice that the card has been lost, stolen or used by persons under eighteen years of age or that the card is no longer desired.

2. Required the person receiving the material that is harmful to minors to use a token in order to use the vending machine.

C. A person who violates this section is guilty of a class 6 felony.

Arizona Rev. Stat. § 13-3506

A. It is unlawful for any person, with knowledge of the character of the item involved, to recklessly furnish, present, provide, make available, give, lend, show, advertise or distribute to minors any item that is harmful to minors.

B. This section does not apply to the transmission or sending of items over the internet.

C. A violation of this section is a class 4 felony.

Arizona Rev. Stat. § 13-3501

In this chapter, unless the context otherwise requires:

1. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual activity, sexual conduct, sexual excitement, or sadomasochistic abuse, when both:

(a) To the average adult applying contemporary state standards with respect to what is suitable for minors, it both:

(i) Appeals to the prurient interest, when taken as a whole. In order for an item as a whole to be found or intended to have an appeal to the prurient interest, it is not necessary that the item be successful in arousing or exciting any particular form of prurient interest either in the hypothetical average person, in a member of its intended and probable recipient group or in the trier of fact.

(ii) Portrays the description or representation in a patently offensive way.

(b) Taken as a whole does not have serious literary, artistic, political, or scientific value for minors.

2. "Item" means any material or performance which depicts or describes sexual activity and includes any book, leaflet, pamphlet, magazine, booklet, picture, drawing, photograph, film, negative, slide, motion picture, figure, object, article, novelty device, recording, transcription, live or recorded telephone message or other similar items whether tangible or intangible and including any performance, exhibition, transmission or dissemination of any of the above. An item also includes a live performance or exhibition which depicts sexual activity to the public or an audience of one or more persons. An item is obscene within the meaning of this chapter when all of the following apply:

(a) The average person, applying contemporary state standards, would find that the item, taken as a whole, appeals to the prurient interest. In order for an item as a whole to be found or intended to have an appeal to the prurient interest, it is not necessary that the item be successful in arousing or exciting any particular form of prurient interest either in the hypothetical average person, in a member of its intended and probable recipient group or in the trier of fact.

(b) The average person, applying contemporary state standards, would find that the item depicts or describes, in a patently offensive way, sexual activity as that term is described in this section.

(c) The item, taken as a whole, lacks serious literary, artistic, political or scientific value.

3. "Knowledge of the character" means having general knowledge or awareness, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of that which is reasonably susceptible to examination by the defendant both:

(a) That the item contains, depicts or describes nudity, sexual activity, sexual conduct, sexual excitement or sadomasochistic abuse, whichever is applicable, whether or not there is actual knowledge of the specific contents thereof. This knowledge can be proven by direct or circumstantial evidence, or both.

(b) If relevant to a prosecution for violating § 13-3506, 13-3506.01 or 13- 3507, the age of the minor, provided that an honest mistake shall constitute an excuse from liability under this chapter if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

4. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

5. "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or

otherwise physically restrained on the part of one so clothed, for the purpose or in the context of sexual gratification or abuse.

6. "Sexual activity" means:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

7. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast.

8. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

9. "Ultimate sexual acts" means sexual intercourse, vaginal or anal, fellatio, cunnilingus, bestiality or sodomy. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of consummation of ultimate sexual acts.

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA Plaintiff/Appellee, v. JEROME EVENSON Defendants/Appellants.	**1 CA-CR 00-0621** **Department B** **MARICOPA COUNTY** **Superior Court** **No. CR 97-09901**

APPELLANTS' OPENING BRIEF

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STATEMENT OF THE CASE

This appeal arises out of the criminal indictment, trial, conviction and sentencing of long time newspaper publisher Jerome Evenson.

During the 1997 legislative session, the Arizona State Legislature enacted A.R.S. § 13-3513 into law. The new statute, which makes it unlawful for any person to knowingly display, sell or offer to sell in any coin-operated vending machine any material that is "harmful to minors," became effective July 21, 1997. In August of 1997, a search warrant was served on 15 of Appellant's news racks. The racks, newspapers, and coins were seized by police officials. On September 4, 1997, Appellant Jerome Evenson, became the first and only publisher ever charged under this new statute. He was indicted on 15 counts. **IA-1** From the outset, Appellant refused to waive any of his rights, challenging the jurisdiction of the court. **1A-31.** One significant delay occurred when Appellant's prior counsel was successful in obtaining a dismissal of 14 of the 15 counts. The state filed a notice of appeal of this ruling. Appellant, after discharging his counsel, moved pro per, to have the court vacate the order of dismissal and reinstate the courts so he could proceed to trial **IA-99; compare with IA-95; IA-101.** The court refused to reinstated the dismissed charges, delaying Appellant's speedy trial right by approximately one year. Appellant filed no paperwork in opposition to the State's appeal.[1]

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[1] Items in the "index on appeal" shall be referenced **IA** (i.e., the indictment, which is Index Item 1, would be IA-1.) Trial Transcripts shall be referenced **TR** followed by date, page and lines. Trial Exhibits will be referenced as **Exh**.

On March 20, 2000, after 2-1/2 years of delay, including an appeal to the Arizona Court of Appeals by the prosecution, **(IA-73)** Appellant's case subsequently went to trial in the Superior Court of Maricopa County before the Honorable Peter T. D'Angelo. On March 23, 2000, the jury announced that they were hopelessly deadlocked, with nine of the twelve jurors favoring acquittal. **IA-132, 150, 151, 183, 185.** A mistrial was declared, and the second trial was rescheduled for May of 2000.

On May 11, 2000, the second jury trial involving Appellant commenced in Maricopa County Superior Court before the Honorable Frank Galati. On May 16, 2000, Appellant was convicted on 13 of the 15 counts.[2] **IA-237.**

On August 17, 2000, Appellant's motion for new trial was denied. **C.R. 262.** On August 23, 2000, Appellant was sentenced to thirteen designated class 6 felonies, and placed on three years felony probation.[3] Appellant was fined $166,400 ($8,000 per count plus a 60% surcharge). **IA-258, 263, 264; TR-8/23/2000 @ 39:12- 40:8.** On August 24, 2000, Appellant filed a timely notice of appeal. **IA-259.** This court has jurisdiction to review this appeal pursuant to A.R.S. §12-120.21(A)(1), 13-4031.

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2 Two of the 15 newspaper racks did not have papers in them at the time of seizure on August 27, 1997. As a result, the jury acquitted the Appellant on these counts.

3. The trial judge could have left the convictions undesignated, imposing misdemeanor convictions at the conclusion of the sentence. The trial judge instead mandated that all 13 counts be designated felonies. He further directed that probation be extended an additional 3 years if the fines were not paid.

STATEMENT OF FACTS

Appellant Jerome Evenson has been the owner and publisher of the *Beat Newspaper* (formerly known as *The Bachelors Beat*) since 1964. **IA-11.** The newspaper, which has been published weekly in Arizona for over 33 years, is sold from news racks. It is a tabloid-sized newspaper with news, editorial opinions, photographs and advertisements directed primarily to the interests of single and divorced adults, the third largest segment of the population. **IA-11; Exh 2.** The 15 charges arose out of the sale of a single newspaper, dated August 22-28, 1997, identified as Volume 33, No. 29. **IA-1** The 15 counts were based upon the seizure of 15 newspaper racks and the newspapers contained in them. **IA-1.**

At the time of the criminal indictment, the newspaper contained the news, photos and features of World News Syndicate (WNS). **IA-11.** The *Beat* has historically featured news stories of public interest. **TR-5/15/00 @ 101: 14-17; TR-5/15/00 @ 164:21-23.** Many of the news items are simultaneously or subsequently carried on radio, TV and in other general circulation media. Some stories address health and sex themes, without being sexually explicit. Other stories, editorials and columns address social and political issues. Almost every edition includes an editorial page in which the Appellant voices his opinions and comments on current social, economic and political issues of concern to his readers. Other writers' opinions are often featured on this page. **Exh 2; IA-11; TR-5/15/2000 @ 100:22-24.**

To financially support the newspaper, and Appellant's often controversial opinions, the *Beat* prints advertisements

from many businesses such as night clubs, escort services, models, masseuses, entertainers, social clubs and adult bookstores. **Exh. 2.** Readers also advertise seeking to meet other adults with similar interests in the classified "Personal" section of the newspaper. Many of these advertisers place similar advertisements in the New Times, Arizona Republic, Rep, Mesa Tribune and other general circulation newspapers. **IA-11.**

While female breasts were exposed in a minority of the advertisements in the August 22-28, 1997 issue, neither male or female genitalia, or pubic hair, are displayed in the newspaper; there are no four-letter words and no sexually explicit or obscene language in the newspaper.[4] **IA-11.** A careful examination of Volume 33, No. 29 **(Exh. 2)** discloses the following facts:

a. ..... Issue Vol. 33, No. 29 had 44 total pages;

b. There are a total of 193 Display Advertisements in this issue;

1. 55 Display advertisements had topless photos of dancers and models;

2. 138 Display advertisements had NO topless females or nudity type photos;

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[4] In this issue, there was a news photo of a nude, deformed baby resulting from the Chernobyl nuclear plant accident. **Trial Exhibit 2.**

c. 75% of the advertisements included city issued licenses within the ad;

d. Topless photos covered only 16% of the total printed area of the newspaper;

e. No language was found in the paper which is not commonly found on radio or television;

f. There was no sexually explicit commentary or news items.

The newspaper and its publisher, the Appellant, have operated without arrest or prosecution from police and prosecution agencies for over 33 years, selling 8,000 to 12,000 issues of the newspaper weekly. The paper fulfilled an informational need for its intended audience, adult readers. **IA-11.**

A.R.S. § 13-3513 does not criminalize actions by publishers who "give away" rather than "sell" identical type publications from comparable news racks. The new statute imposes no requirement that any minor actually purchase or be harmed by the offending paper. The statute makes no attempt to distinguish between classes of minors, treating 5 year old children identically with teenagers. The statute requires no showing as to whether minors are even exposed to, are interested in, or ever patronize vending machines containing questionable newspapers. The new statute does not allow any meaningful or realistic defenses, nor does it offer any contemporary guidelines for application. See *A.R.S. § 13-3513.*

The new law went into effect July 27, 1997. A meeting was held at the Maricopa County Attorney's Office

with police officials from numerous valley cities in attendance to determine a method of enforcing this new law. It was decided at the meeting to take no action unless a citizen filed a complaint. **TR-5/15/ 00 @ 16:5-18:3** On August 26, 1997, a mere five weeks after the effective date of the new statute, and after four more issues of the newspaper were published, police officials, having received only one citizen complaint, obtained and executed search warrants authorizing the seizure of 15 of the *Beat* newspaper's 235 news racks in Maricopa County. **IA-1.**

The trial testimony revealed that the criminal investigation against Appellant arose out of a single complaint levied by an adult 67 year old male, with no minor children. The complainant, Alfred Nelson, felt that he and his neighborhood group were the "ears and eyes of the police department." **TR-5/11/00 @ 4:10-14.** At trial, Witness Nelson and three police officers testified for the state. Nelson told jurors that he made it his practice to drive around the neighborhood acting as a member of Block Watch for the police. **TR-5/11/00 @ 4:17-20** Nelson testified that in August of 1997, he had gone to a Circle K at 7th Avenue. He claimed that he went in to get a newspaper and found a *Beat* paper sitting on top of a rack outside of the Circle K Store. **TR-5/11/00 @ 5:8 - 6:2.** He saw other newspapers inside the rack. He claimed that he put the newspaper back on the rack, and later called police because he didn't feel that this newspaper should end up in the hands of children. **TR-5/11/00 @ 7:13-19.** Nelson admitted that his own children (2 sons and 1 daughter), to his knowledge, had never purchased or seen a copy of the *Beat* newspaper, **TR-5/11/00 @ 13:13-17; 17:16-19** even though he had lived in the same house for 21 years. **TR5/11/00 @ 13:8-10.** He knew of no minors who had ever been exposed to or seen the newspaper. **TR-5/11/00 @ 13: 18-22**. He admitted that no one in the neighborhood

had ever complained about the *Beat* newspaper to him as part of his "Block Watch" duties **TR-5/11/00 @ 15:20- 16:1.** He claimed that he was not offended by the *Beat* newspaper. **TR-5/11/00 @ 16:7-15; TR-5/11/00 @ 18:25-19:2)** nor did he witness any minors interested in either the vending machine or the newspapers in the machine. **TR-5/11/00 @ 19: 3-5.** He has never seen any minor pay 50¢ to purchase a *Beat* newspaper, nor had he seen any minors with copies of a *Beat* newspaper. **TR-5/11/00 @ 20:18-23.** What is particularly chilling about this record is the fact that a publisher stands convicted of 13 felonies on an undisputed record that there is no evidence, anywhere, that any minor has ever seen, let alone purchased, a *Beat* newspaper in its 33 years of existence. **TR-5/11/00 @ 13:18-22; TR-5/15/00 @ 3:17-23; TR-5/11/00 @ 47: 10-13; TR-8/23/00 @39:15-20.** Appellant filed several motions to dismiss for speedy trial violations. **IA-37; IA-47, IA-114; IA-192.** Appellant filed notices with the court indicating that he would not arbitrate his rights nor would he waive his rights. **1A-31; 1A-77; 1A-137.**[5]

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[5] Nelson told Phoenix Police Detective White, when he made his initial complaint, that he had been provided the *Beat* newspaper at a neighborhood association meeting, and never claimed that he found the newspaper sitting on a Circle K store newspaper rack as he told the jury. **(TR-5/15/00 @ 87:25-88:2; 105:16-20; 110: 15-19; compare with Nelson's testimony at TR-5/11/00 @ 5:8-6:2; 14:13-20; 15:1-5)** The Detective further testified that Nelson had received an earlier issue at the neighborhood meeting but that this issue was no longer in news racks. It was the Detective who asked Nelson to go and buy the August 21-27, 1997 issue. **(TR-5/15/00 @ 88:10-21)** Nelson had additionally told the officer that he had reviewed the entire newspaper and was offended. Nelson's wife was sitting with him when the report was made to police. **(TR-5/15/00 @ 100:13-17;114:15-23)** Nelson had told the trial jury that he and his wife had never read or discussed the *Beat* paper. The officer noted that this testimony was not true; that Nelson and his wife were

Sergeant Ken Thatcher, the second trial witness, was a 17 year veteran with the Chandler Police Department. He testified that has never received a complaint about the "*Beat*" from any citizen in Chandler, **(TR-5/15/00 @ 33: 12-16)** nor had he ever conducted any investigation involving any allegation that the "*Beat*" ended up in the hands of any child. **TR-5/15/00 @ 33:17-23.** The seizure in Chandler had nothing to do with the victimization of any minor under 18. **TR-5/15/00 @ 33:24- 34:2.** Indeed, when Detective Thatcher went to two separate locations to view the *Beat* Newspaper through the Plexiglass prior to the seizure, he could not see anything which he considered to be "harmful to minors". **TR-5/15/00 @ 35:4-8.** Thatcher had attended a meeting on August 21, 1997, one month after the new legislation took effect, to lay out a strategy for a simultaneous, concerted action between different municipalities on the first case to brought under the new statute. **TR-5/15/00 @ 16:9-17:6.**

The third witness to testify was Detective William White of the Phoenix Police Department. Detective White knew of no seizures of this newspaper during the preceding 11 years until the seizure in this case. **TR-5/15/00 @ 42:17-20** White confirmed that a "task force" type planned sweep once someone who was a citizen reported a violation of the statute. He had no information from Mesa, Chandler or Scottsdale which prompted the prosecution. **TR-5/15/00 @ 102: 9-14** He testified that there were some 200-230 racks of

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sitting together discussing the paper when he met with them. **(TR-5/15/00 @ 106:1-5; compare with 5/11/00@15:10-19)**

Beat throughout the entire valley in 1997. **TR-5/15/00 @ 102:18-25.** Detective White felt there was nothing in the newspaper, Exhibit 2, which was directed towards minors, and that the defendant Evenson was making no attempt to get his newspaper into the hands of minors. **TR-5/15/00 @ 107:10-12.** In all of his years of working the vice detail, Detective White had never received a complaint about a minor obtaining possession of the *Beat*. He similarly was never involved in any type of investigation against the paper between 1995 and 1997. **TR-5/15/00 @ 107:17-21; 110:1-9.** White admitted that he had no knowledge of any investigative leads involving one child who was ever harmed by the *Beat* during the 33 years of its publication. **TR-5/15/00 @ 127:1-5.**

Detective White testified that the *Beat* news publication is directed toward adults, not minors. He further believes that the defendant was not attempting to distribute his newspaper to minors. **TR-5/15/00 @ 112:22-25; 131:5-9** Detective White agreed that the Arizona Republic carries provocative advertisements similar to the *Beat*, as do other general circulation valley newspapers. **TR-5/15/00 @ 113:10-14; 120:17-19.** Detective White admitted that genuine pornographic materials are readily available to minors on the Internet and are far worse and more damaging to youth than anything he has ever see in the *Beat* newspaper. **TR-5/15/00 @ 119:3-8.** Detective White told the jury that A.R.S. § 13-3513 is so ambiguous and vague that "we don't know this is obscene." He leaves the decision of "harmful to minors" up to the public, not police or prosecutors. **TR-5/15/00 @ 116:15-25; 117:5-10.** Appellant's trial counsel aggressively attacked the indictment on the same grounds as those acknowledged by Detective White, i.e. ambiguity and overbreadth. **IA-12; 53.** Detective White acknowledged that there is vulgarity on numerous television shows seen by minor children every day. **TR-5/15/00 @ 118:18-24.**

Detective White further conceded that there is far more nudity, both in numbers and in explicit content, in Playboy magazine and over the internet, than has ever been shown in the *Beat*. He further emphasized that the presence of topless nudity in this newspaper did not make it a crime. **TR-5/15/00 @ 119:2-18; 124:14-22.**

Detective White gave a chilling account of the circumstances surrounding the execution of these search warrants. White testified that a group of senior Phoenix police officials and the County Attorney, Richard Romley, staged a circus type media event at the first location of the police seizure. The County Attorney was interviewed by the media at this same location. Detectives were ordered to wear "ski masks" to conceal their identity. Detective White admitted that the scripted media event potentially placed the lives of undercover offers in danger and that the Indian School location would not have been the first search location for serving the warrant had it not been for the planned media event. **TR-5/11/00 @ 134:15-23; TR-5/15/00 @ 69:25-71:16; 107: 22 -108: 7; 109:8-12.**

Detective White admitted that the methods suggested by A.R.S. § 13-3513 for avoiding criminal sanctions were essentially meaningless. For example, the legislature had suggested that special tokens might be manufactured to access vending machines. White acknowledged that such tokens would be easily duplicated and that this proposed safeguard was very expensive, costing an estimated $100.00/machine. **TR-5/15/00 @ 120:20-121:12.** The other legislative suggestion, which contemplated machines with "pass through magnetic cards" was impractical. Indeed, the only device he had seen replicating this legislative suggestion were ATM machines. **TR-5/15/00 @ 121:12 - 122:13.** Since there were no electrical outlets on street corners where vending machine racks were located, this alternative could not be feasible.

The fourth and final witness was officer Anthony Lythgoe of the Mesa Police Department. Detective Lythgoe, like the other states witnesses, had never investigated or known of any complaint against the *Beat* regarding purchase

or possession of *Beat* newspapers by minors at any time in his law enforcement career. **TR-5/15/00 @ 161:6-10.** Detective Lythgoe was not aware of any child ever purchasing any *Beat* newspaper from any of the 17 locations in Mesa. **TR-5/15/00 @ 161:11-13; 169:4-7.** Mesa Police never did any type of surveillance to determine whether or not minors purchased or had any interest in the *Beat* newspaper. **TR-5/15/00 @ 168:5-7.** Mesa Police left no warning on any of the remaining newspaper stands not taken as a part of this raid. **TR-5/15/00 @ 169: 17-21.** Lythgoe stated that the Mesa Police decided to just seize 5 of the 17 machines in Mesa only because of an issue of storage since the news racks take up a lot of space. **TR-5/15/00 @ 145:18-20.**

During the course of the pretrial and trial proceedings, Appellant vehemently challenged the Constitutionality of A.R.S. § 13-3513 **(IA-12)** based upon grounds of vagueness, overbreadth and arbitrariness, the unreasonable prior restraint created by the statute and subsequent seizure of news racks **(IA-13, IA 187)**, the fact that Exhibit 2 (the alleged newspaper in question) was not harmful to minors as a matter of law **(IA-21)**, various motions to dismiss based upon denial of speedy trial **(IA-37, IA-190).** The Appellant also vehemently objected to jury instructions submitted by the state and given by the court, as well as the court's failure to give some of its own jury instructions. **TR-5/16/00 @ 13:18-14:13; TR-5/16/00 @ 14:18-16:9.**

The trial record was undisputed that no child had actually ever been purchased or been exposed to the Beat newspaper. The Deputy prosecutor, in the presence of the jury panel, conceded that the state knew of no child who had purchased or seen the paper. **TR-5/15/00 @ 120:20-121:12.** The trial judge, at sentencing, expressly found that there was "...no complaint of any parent saying my kid got hold of

this..." **TR-8/3/00 @ 39:17-18.** Complaining witness Nelson **TR-5/11/00 @ 13:13-17; 17:16-19**, Detective White, **TR-5/15/00 @ 127:1-5.**; Sergeant Thatcher **TR-5/15/00 @ 33: 12-23** and Detective Lythgoe **TR-5/15/00 @ 161:6-10** all agreed that they had never received complaints about the newspaper impacting minors in any way.

ARGUMENT

I. WHEN A LEGISLATIVE BODY ENACTS A STATUTE WHICH IS USED TO TARGET AND PROSECUTE "CONTENT BASED" PUBLICATIONS PRINTED FOR AND DIRECTED TO AN ADULT SEGMENT OF THE POPULATION, AND CRIMINALIZES THE ACTS OF THE PUBLISHER IF THE CONTENTS OF THE NEWSPAPER MAY POTENTIALLY BE "HARMFUL TO MINORS," DOES THE CONSTITUTION REQUIRE THAT THE STATE PRESENT EVIDENCE OF ACTUAL HARM TO MINORS?

A. Newspaper publications and their representatives are afforded the broadest and most sweeping protection's under the U.S. Constitution. Whenever government attempts to infringe upon the freedoms of speech or the press, the Government must prove beyond a reasonable doubt that the harm sought to be protected is real, and not speculative.

A.R.S. § 13-3913 is a "content based" law directed at a newspaper sold from newspaper vending machines. A regulation is content-based if it is aimed at inhibiting the

expression itself. Conversely, a regulation is "content-neutral" if it is designed to control only secondary effects resulting from the protected expression. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 49 (1986). Newspapers, because of the First Amendment speech and press protections, are provided the broadest protection's available under the U.S. Constitution.

In *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 183 (1999), the Supreme Court held that the First Amendment mandates close scrutiny when government imposes restrictions on speech. See also *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). The State bears a clear and heavy burden to justify any restrictions imposed against speech. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509 (1969); *U.S. v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (May 20, 2000). The U.S. Supreme Court has mandated that rights to free speech or free press cannot be curtailed unless the restriction "directly and materially advances the asserted government interest." The New Orleans decision held that this burden cannot be sustained by hypothetical speculation but by hard, demonstrable facts.

> This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. (Citing *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). See also *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)

The State has dismally failed to justify the constitutionality of

A.R.S. § 13-3513 with hard, demonstrable facts. There is no evidence that minors are attracted to these news racks, or that any minor under 18 was ever exposed to the issue Volume 33, Number 29.

B. The government bears a "heavy burden" to explain why a less restrictive provision would not be as effective.

The government must not only prove that a harm is real by substantial evidence, but must further demonstrate that there is no "less restrictive provision" to curtail the perceived danger. As the *Edenfield* decision noted:

> The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be a s effective ... ; *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993).

The legislature's tortured attempt to impose "less restrictive provisions" in A.R.S. § 13-3513 fails for two reasons:

1. the evidence fails to demonstrate that this newspaper presents a genuine harm to minors, and

2. the defenses provided by the statute are inpractible and unworkable.

The record is clear and uncontested that no minor has been seen or observed possessing or purchasing this paper from a vending machine. Even if such evidence did exist, the proposed statutory defenses are meaningless and totally miss the mark.

A.R.S. § 13:3513 B1 and 2 makes it a defense if the publisher somehow requires access to his news racks by means of a pre-issued identification card, further requiring that a procedure in place to immediately cancel any card once it is discovered that the user is under 18. This defense is patently unworkable and is nothing more than a camouflage attack to eliminate the publisher from doing business from his news rack. The cards contemplated by the statute are similar to ATM cards. The prohibitive costs of applying for the card, printing the card, providing the technology for processing the card, and locating electrical outlets on street corners to operate such a sophisticated system, make the alternative suggestion ludicrous.

The other suggested defense is substitution of a token for U.S. coins. The use of tokens would likewise not be feasible. Detective White placed the cost at approximately $100.00 per news rack, plus the costs of conversion. These costs would exceed the cost of the rack itself, and drive the publisher out of business. The legislature has further failed to suggest how the Appellant is supposed to get these tokens in the hands of adults wanting to purchase the newspaper. Detective White acknowledges that these remedies appear to be unworkable or infeasible. **TR-5/15/00 @ 120:20-123:17.**

There are other alternatives available to the publisher of the *Beat* newspaper but they are equally impractical. Appellant could put the newspapers on sale in adult businesses. But then the papers would not be available from 1:00 a.m. to 8:00 a.m. The State legislature orders those businesses to be closed during those hours. See *A.R.S. § 13-1422*. Also, many adult customers who might want to buy the newspaper feel uncomfortable going into an adult establishment to buy it. It would have the effect of driving

Appellant out of business. Additionally, since the *Beat* newspaper is already being sold in those outlets, removal of the news racks from the streets would reduce the circulation 80 to 90 percent, a level where it would no longer be financially possible to continue publication. The legislature did not suggest how a publisher could make his coins readily available to valley visitors wanting to purchase a copy of the newspaper.

Another alternative considered would be to have adults "hawk" the papers to passing motorists, or those stopped at signal lights. But the City of Phoenix, in February of 1997, the same time frame when A.R.S. § 13-3513 was adopted by the legislature, passed an ordinance which prohibits selling anything to a person in a vehicle on the city streets. See *Phoenix City Ordinance, Art. X, Sec. 36-131.01,A.* The City of Phoenix, with the highest density of population, is the primary circulation area of the *Beat* newspaper in Arizona.

The defenses and alternatives to Appellant are non-existent. Either continue publication under the vague law, risking further prosecutions from a publicity minded, politically ambitious County Attorney who oversees each publication with his invisible but potent arm of the law, or cease publication. These alternatives are contrary to the intent of the First Amendment and violate the rights of the Appellant.

C. The State carries a strong burden of demonstrating justification for the restrictions imposed by statute.

The United States Supreme Court, in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503,

509 (1969), held that "[T]he State bears the burden of justifying its restrictions ... " The court added

> In order for the State ... to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

The State must prove, when content based legislation attacks free speech and free press, that there is an actual harm taking place to minors by the publication of the *Beat* newspaper, Volume 35, No. 29. See also *Reno v. American Civil Liberties Union,* 521 U. S. 844, at 879 (1997). The State has utterly failed in this burden, and the consequences of this failure take on constitutional dimensions.

D. Content-based regulations are presumptively invalid. The Government bears the burden of rebutting the presumption of invalidity. A.R.S. § 13-3913, being directed against newspapers, is presumed to be invalid.

When the State for federal government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional or state enactments is reversed. "Content-based regulations are presumptively invalid." *U.S. v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878 (decided May 20, 2000). The Government bears the burden to rebut that presumption. See *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). When Congress or state legislatures attempt to restrict or punish "content based speech," their actions should be subject to strict scrutiny.

U.S. v. Playboy Entertainment Group, Inc., supra. The State of Arizona, in the trial of Appellant Evenson, dismally failed to rebut this presumption of invalidity, by failing to provide a single piece of evidence that any minor in this state is, or ever has been, harmed by the contents of this newspaper.

E. The case of *United States v. Playboy Entertainment Group, Inc.* mandates that the jury verdict, judgment and sentence be reversed and the prosecution dismissed with prejudice. The conviction violates fundamental constitutional free speech and due process rights in that:

1. the statute levy's a direct assault on content-based speech which is, at worst indecent, not obscene;

2. the state was unable to show or demonstrate that any minor, in thirty-three (33) years of weekly publications, has ever been exposed to, possessed or had purchased the *Beat* newspaper;

3. the state was unable to show, through the mouth of any witness, that any minor ever saw or was exposed to the August 1997, Volume 33, No. 29 issue of the *Beat*;

4. **the State failed to produce any expert testimony showing that this newspaper could or would be harmful to any minor;**

5. **the State did not initiate any investigative techniques to see if minors were actually purchasing or examining the *Beat* through coin-operated machines. There was no law enforcement surveillance of any of the 230 racks, no video surveillance camera's to observe activity, or no parental complaints aboutaccess to vending machines by their minor children.**

The United States Supreme Court, in the last term, rendered a major ruling in *United States of America v. Playboy Entertainment Group, Inc.*, supra. That decision is dispositive of this case and mandates a reversal of these convictions and dismissal of these charges.

In the *Playboy* decision, the action arose out of Congress' efforts to address the problem of "signal bleed" on cable television channels that carried and marketed sexually explicit, "adult" programming to cable customers. Signal bleed occurred when cable companies partially scrambled or otherwise blocked the signal on sexually explicit channels, in an effort to deprive those who did not pay for such channels of a clear signal. Because the scrambling technology meant that success was only partial, intelligible video and audio signals remained, and were transmitted to all households on the cable system. As a result, children in those households

that did not subscribe to Playboy's programming services, would potentially be exposed to viewing and hearing uninvited sexually explicit programming in the privacy of their homes.

According to the government evidence, millions of households nationwide received cable television. Cable customers in these millions of homes could order premium programming on a pay-per-view basis, permitting the customer access to sexually explicit programming for a specified additional fee. The technology limitations of the scrambling lacked the sophistication to eliminate "signal bleed." Non-subscribing households around the country were receiving signal bleed "adult programming" signals in their homes. Any child turning to an adult channel could hear sexually explicit conversations, and observe partial images of nudity and sexual activity. This phenomenon created a political uproar, prompting Congress to take action.

Congress enacted Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136, to address the problem. Congress, in the legislative history, noted that it was "aware that some cable systems [were] permitting 'adult' programs that [were] clearly unsuitable for children to be received in the home without sufficient scrambling." S. Rep. No. 367, 103rd Cong., 2d Sess. 103 (1994). Senator Feinstein, one of the sponsors of Section 505, explained that "[p]arents * * * come home after work only to find their children * * * watching or listening to the adults-only channel, a channel that many parents did not even know existed." 141 Cong. Rec. S8167 (daily ed. June 12, 1995). As an example, she referred to the fact that a "partially scrambled pornography signal was broadcast only one channel away from a network broadcasting cartoons and was easily accessible for children to view."

To alleviate this problem, Section 505 required cable operators to "fully scramble or otherwise fully block the video and audio portion" of channels that provide primarily "sexually explicit adult programming." They were further required to show the "indecent" or "sexually explicit adult programming" only during so-called safe-harbor hours of 10:00 p.m. to 6:00 a.m. when children were not likely to be viewing the programming. *Playboy Entertainment* brought an action in the United States District Court challenging the constitutionality of the statute.

In comparing the harm contemplated by the Playboy with the harm contemplated by the *Beat*, Playboy's product pales the Beat in potential harm to minors.

1. Playboy's product, exhibiting full frontal nudity and explicit sexual intimacy between adults hour after hour on a television screen, is far more harmful to minors than the weekly *Beat* newspaper, which at worst displays topless women in a minority of its advertisements;

2. Playboy's cable product is dramatically more intrusive, potentially going into every home of every cable customer in America, even where adults within that home do not subscribe to the service. The *Beat* newspaper, on the other hand, does not intrude in any home, is not sold, distributed or mailed to any home. It is locked in news racks and requires 50¢ to purchase a copy.

3. Playboy's cable potential for harm to minors dwarfs the potential harm contemplated by the *Beat* newspaper. Playboy's service accessed approximately 40 million homes throughout the United States. The *Beat* distribution in Maricopa County averages 8,000 to 12,000

copies per week.

4. The protected class (minors) is dramatically more at risk with the explicit video and audio of Playboy than with the *Beat* newspaper. Any child flipping a channel is at risk of viewing graphic sex through signal bleed, from toddlers through teenagers. There was hard evidence in the *Playboy* record of small children being "transfixed" by scenes of "a naked man sodomizing a woman" and the "groans and epithets that go along." Since the *Beat* is locked in a news rack effectively precluding access to smaller children, its cost of 50¢ preclude's younger children from every acquiring a paper.

Newspapers in this country have dual constitutional protection's of "free speech" and "free press." Congress (targeting Playboy) and the State Legislature and the County Attorney (targeting the *Beat*) enacted, and applied, legislation directed against Playboy and the *Beat* for the same identical reasons - to protect minors. The two targets, Playboy and the *Beat*, sell products which are, at worst, indecent, not obscene. Each entity has First Amendment protection's. The issues and rationale of *Playboy* is clearly controlling in this case.

The court in *Playboy Enterprises* ruled that indecent speech, unlike obscene speech, is entitled to First Amendment protection. *Playboy* held that government officials could not suppress the free-speech rights of adults in order to protect minors from objectionable material unless the law was very narrowly defined. The court identified the problem as follows:

> First, we shall assume that many adults themselves would find the material highly offensive; and when we consider the further

> circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it.

Adults have a constitutional right to view the Beat Newspaper, just as they have the right to view Playboy cable programming. Adult advertising in the Beat might disturb some adults, but every adult in this country who chooses has a right to purchase and read the Beat newspaper. Since the newspaper and commentary is not obscene, speech contained within this paper cannot be suppressed under the guise of "harmful to minor" statutes unless compelling evidence is established which justifies government prosecutions.

The Supreme Court of the United States, in *Playboy,* held that even though admittedly damaging bleed signals were entering peoples homes when parents were not at home to supervise their children, that fact alone did not justify curtailing free and protected speech.

> The speech here, all agree, is protected speech; and the question is what standard the Government must meet in order to restrict it. As we consider a content-based regulation, the answer should be clear: <u>The standard is strict scrutiny</u>. This case involves speech alone; and even where speech is indecent and enters the home, <u>the objective of shielding children does not suffice to support a blanket ban</u> if the protection can be accomplished by a less restrictive alternative.

The Supreme Court mandated that before Congress could curtail Playboys right to send its signal, the government had to prove that "signal bleed" was actually being seen by children, lots of them. The court wrote:

> The District Court began with the problem of signal bleed itself, concluding "the Government has not convinced us that [signal bleed] is a pervasive problem." *Id.*, at 708-709, 718. The District Court's thorough discussion exposes a central weakness in the Government's proof: There is little hard evidence of how widespread or how serious the problem of signal bleed is. Indeed, there is no proof as to how likely any child is to view a discernible explicit image, and no proof of the duration of the bleed or the quality of the pictures or sound. To say that millions of children are subject to a risk of viewing signal bleed is one thing; to avoid articulating the true nature and extent of the risk is quite another. Under §505, sanctionable signal bleed can include instances as fleeting as an image appearing on a screen for just a few seconds. The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this. Although the parties have taken the additional step of lodging with the Court an assortment of videotapes, some of which show quite explicit bleeding and some of which show television static or snow, there is no attempt at explanation or context; there is no discussion, for instance, of the extent

> to which any particular tape is representative of what appears on screens nationwide. 120 S. Ct at 1889.

The Supreme Court, in striking down the legislation, mandated that government authorities had to prove and establish the quantitative effect of "signal bleed" in actual documented cases before Playboys right to carry its signal could be impeded. In other words, the government had to demonstrate the pervasiveness of the alleged problem? Was the "signal bleed" occurring in one home or ten thousand homes? Had only one child been exposed to the sexually explicit programming, or had it been 100 or 1,000 or 10,000?

> The question is whether an actual problem has been proven in this case. We agree that the Government has failed to establish a pervasive, nationwide problem, justifying its nationwide daytime speech ban."
>
> 120 S.Ct. at 1891.

The State of Arizona has failed to provide a single instance where any minor, even one minor, has ever been exposed to the newspaper in question. The legislature designed a mischief in enacting A.R.S. § 13-3513, and then chilled free speech by creating a hypothetical evil that does not appear to exist. Despite the newspaper's 33 years of operation, the State has failed to provide a single instance where a minor possessed or purchased a "*Beat* newspaper." *Playboy Enterprises* demands that the government actually prove, by quantitative numbers and qualitative facts, that the mischief targeted by the legislature is actually impacting minors in a significant way before arbitrary roadblocks can be constructed in a democracy. The state simply cannot chill

free speech and a free press by interfering with publication of the message and criminalizing the messenger under the guise of hypothetically protecting minors. Even in a case where the facts clearly demonstrated that some children were exposed to harmful "bleed" signals and where access to explicit and graphic sexual activity potentially intruded into millions of American homes, the government could neither criminalize nor legally restrict sale of a product targeted for adults under the guise of harming children. The State of Arizona has dismally failed to produce any evidence that minors are exposed to the Beat, and, in fact, the State has conceded failure during the course of the trial. *Playboy Enterprises* mandates reversal of the judgment and sentence and dismissal of these criminal charges.

F. The state could have easily developed evidence to show whether or not the *Beat* newspaper, sold from a news rack, provided any type of rational danger to minors. They failed to make any attempt to show this paper placed minors at risk.

The State not only failed to produce any evidence of potential risk to minors, but it didn't even attempt to gather such quantitative or qualitative evidence. There was no police surveillance activity directed towards any of the 230 news racks in Maricopa County to see if minors even had any interest in these newspapers. Police did not attempt to set up video surveillance cameras to observe traffic at *Beat* news racks. No witnesses ever saw any minors possessing a newspaper, looking through the protective glass, or trying to acquire the offending newspaper issue, or any prior issue. Indeed, if this tiny newspaper was having a harmful effect on minors, one would suspect that parents would be calling law enforcement authorities complaining about their children

purchasing or possessing this paper. None of the state's witnesses had ever heard of any such complaint. There is no evidence of any kind to support this perceived risk to minors.

II. HAS THE STATE LEGISLATURE ENACTED A STATUTE DIRECTED AT THE PRESS WHICH ARBITRARILY AND UNREASONABLY CLASSIFIES THOSE SUBJECT TO PROSECUTION UNDER A.R.S. § 13-3513? IS THE STATUTE CONSTITUTIONALLY DEFECTIVE BECAUSE IT IS OVER-INCLUSIVE AND UNDER-INCLUSIVE IN ITS SCOPE?

In September of 1949, Professor Jacobus tenBroek and Professor Joseph Tussman co-authored one of the most far reaching scholarly law review articles of the last century. Their brilliant and critical analytical masterpiece, entitled "Equal Protection of the Laws," was first published in the California Law Review and has been cited by scholars and courts and featured in law textbooks for half a century. See 37 Cal. Law Rev. 341 (1949); See also Appendix A.

The two scholars discussed the distinction between "general" laws (laws which apply without qualification equally to all persons) and "special" laws (which apply to a limited class of persons.) Robbery is a general law. Any person who, without the consent of the owner, points a gun at a human being and, under force or threats, takes their property, falls within the scope of that law. There are no exceptions for rich or poor, black or white, learned or uneducated, citizen or non-citizen. The prohibitions of the law are clear and the class targeted under the statute is unambiguous.

"Special laws," on the other hand, are uniquely different. They do not apply to all people. By their very terminology, they include some people and exclude others. A.R.S. § 13-3513 is a special law, on its face and as applied, targeting a newspaper publisher who sells his product from vending machines.

For a "special" law to pass constitutional scrutiny, the last must *be reasonable*. As Professors tenBroek and Tussman noted:

> A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of the law may be either the elimination of a public "mischief" or the achievement of some positive public good. (Emp. added)

A.R.S. § 13-3513 is a "Special Law." The critical criteria in evaluating any statute is to determine the reasonableness of the classification. In deciding the reasonableness of the classification, and hence its constitutionality, a court must take into account the purpose of the law, and determine whether the group defined by the legislation is reasonably included in the legislation. A court must scrutinize a statute to determine if people possessing the trait are excluded and, if so, why they are excluded. If a group of people possessing identical traits as the "included" group are "excluded," the statute is unequal and violative of the constitution. Professor tenBroek and Tussman describe such a statute as "under-inclusive. On the other hand, when the scope of the criminal statute is so broad and sweeping that it reaches out and ensnares "innocent" citizens within the same mischief classification, such a statute is overbroad or

"over-inclusive". A.R.S. § 13-3513 is over-inclusive, under-inclusive, and arbitrary.

A. A.R.S. § 13-3513 unreasonably excludes others who are identically or similarly situated and whose materials are far more accessible and damaging to minors. A.R.S. § 13-3513 is therefore unconstitutional because it is "und.er-inclusive."

The subject statute used to charge Mr. Evenson is "under-inclusive" and fundamentally unequal and unconstitutional. The trial record demonstrate the absurdity of this classification. Materials that are significantly more "harmful to minors," are readily accessible to minors in forms far more damaging than this innocuous 50¢ newspaper found on street corners once every week. If the mischief sought to be corrected by this statute is to identify and penalize those who provide or make available material harmful to minors, the legislature has fired their salvo and tragically missed the broad side of the barn with this legislation.

There is overwhelming evidence that virtually every minor child in this country is exposed to the television and, to a lesser extent, the internet and other forms of communication many thousands of times more damaging than anything in this newspaper. The mischief supposedly caused by the *Beat* newspaper is literally dwarfed by audio and video programming seen and heard daily on local radio and television, in local movie theaters, on the internet, in video arcades, in bookstores, and even our public libraries. The lyrics and musical content found on CD's and music video's, readily available to minors, advocate and encourage promiscuity and rampant violence. The poison messages of violence, with dozens of murders each day on television, are

only a portion of the problem. Studies conducted of children's programming contain 20 violent acts each hour. The filthy language and rampant sex dwarf the so-called harm of this tiny newspaper. From the soap operas to Jerry Springer, children, from their most tender years, are exposed to an endless stream of simulated sex acts and other unmitigated trash, while the *Beat* newspaper carries no foul language, no explicit sexual material, semi-nudity is limited to only topless photos of models and dancers.

The damage to minors arising from other publications and media, the *Beat* newspaper's competitors, is well documented and is not limited to television, cable or satellite services. The local newspapers and television stations have widely reported stories about underage minors, under age 17, being admitted to local movie theaters showing "R" rated movies filled with sex, nudity, vulgarity, and violence. Minors, 14 and older, are legally permitted to attend movies displaying nudity with nothing more than a "PG rating" attached, for parental notification. Commitments from theater managers to exclude under-age minors has been a joke. Virtually every conceivable type of lascivious material can be found on the internet, in book stores, or within the library. The description of President Clinton's activities with Monica Lewinsky, carried in all major metropolitan newspapers, dwarfs the explicit content of the *Beat* newspaper.

If the Arizona legislature really intended to take action against sources providing material genuinely harmful to children, did they run out of ideas when they passed A.R.S. § 13-3913? Why are the movie theaters excluded from the prohibited class? Why are the television writers, entertainers, and networks excluded? What protection's existed in public libraries to prevent children accessing books and internet materials far more risque than this weekly newspaper in 1997,

when these prosecutions were initiated? Where are the songwriter's and entertainers who, through dazzling rap messages or enticing musical melodies or rhythm, seduce our youth with messages of promiscuity, lewdness, hate and violence? This legislation, for obvious political purposes, attacks a non-existent hypothetical problem which affects no minors while leaving untouched those who produce and exhibit to minors a sea of filth and vulgarity which flood our homes and schools and airwaves.

B. The Statute is unconstitutional because it creates an arbitrary and unreasonable classification - it applies only to Coin Operated Machines where products are "sold."

A.R.S. § 13-3513 is fatally flawed by an irrational classification that ties criminality to "coin operated" machines, especially when the item being offered or sold is not illegal, in and of itself. It is not illegal for minors to have this newspaper, nor would parents be considered unfit if they permit their minor child to see the newspaper. The absurdity of this legislative classification is evident. It would not have been a crime for Mr. Evenson to give away his newspaper from a news rack in the same manner as the *New Times*. His placement of his newspaper in a vending machine news rack only becomes a crime because he requires the purchaser to deposit two U.S. minted coins in a machine to acquire it. This classification is illogical and unconstitutional. If Mr. Evenson placed the identical newspaper on the internet, television, cable or on the shelves of a local bookstore or in a public library, there would be no criminal liability. Where there is no reason, related to the purpose of the act, that would justifying exempting certain select groups from its restrictions, a law violates the Equal Protection Clause.

Eisenstadt v. Baird, 405 U.S. 438 (1972). The Phoenix public library does not use news racks, but has materials just as explicit on the shelves for minors to possibly see. They make the Internet available for free to minors, which mean that they can access hard core pornography in the library. **IA-11**

If the Arizona State Legislature was genuinely seeking to prohibit minors from gaining access to "The *Beat*," inducing Mr. Evenson to start making his newspaper available "free" rather than selling it would dramatically increase the risk of exposure to minors. If it was free, a minor could simply walk up and take one, like the public does with the New Times, or the Spectrum Weekly, a local gay newspaper. Being locked in a display case which will not open without a deposit of 50¢ excludes all minors except those who would think it is worth two of their valuable quarters to purchase the publication. Why should a publisher who creates a paper solely for distribution to adults be subject to prosecution if he sells that material for 50¢, but not be prosecutable if he chooses to give it away? If the newspaper was genuinely harmful to minors, it would be just as harmful if they paid 50¢ as it would be if they received it for free. Indeed, the 50¢ price tag would discourage more than encourage a minor from removing a copy of the paper from a news rack.

The record before this court demonstrates that Law enforcement authorities cannot prosecute the publisher of a homosexually oriented newspaper, even if minors line up to take a copy from a newspaper rack, because it is free. **TR-5/15/00 @ 112:6-8.** A photograph of competing newspapers are seen in Exhibit 9, positioned next to one of the seized racks of Appellant.

C. A.R.S. 13-3513 is "over-inclusive" in that it's prosecutorial scope can include writers, publishers, printers, and those who deliver and fill the news racks. Due to the vagueness of the statute, and the whims of the Prosecution, innocent citizens can easily be included within the offending targeted class defined in A.R.S. § 13-3513.

A.R.S. § 13-3513 is unconstitutionally vague and overbroad. The lead detective testified:

> Q. So this being a moral issue, most of the code is based on morals. Thou shall not kill. Thou shall not steal. Those are moral issues?
>
> A. That's correct. It is pretty obvious when somebody was killed, they are dead. Whereas, we don't know this is obscene.

TR-5/15/00 @ 117:5-10

The trial judge referenced the ambiguity and vagueness of the statute on several occasions before the jury.

> I will tell you this is not the clearest law I have seen, but never the less, you'll be asked to apply the law. And irrespective of what your personal opinion is about what the publication is, you are going to be asked to apply the legal standards.

TR-5/11/00 @ 39:25-40:5

Judge Galati highlighted the vagueness problem in an exchange with appellant's prior counsel, Tom Thinnes.

> Mr. Thinnes: Like you told the jury, this is one of these cases that you've never had before.
>
> THE COURT: I agree. I agree with your description earlier about trying to catch smoke in a net, a lot of that seems to be the case here. To me, we're sort of throwing it in their lap (the jury's) and saying, Okay, tell us what the crime is, and to me, I've never been in that position before.

TR-5/16/00 @ 15:22-16:2.

Prosecutor Campagnolo admitted the ambiguity of the statutory guidelines for this offense to the trial jury in his voir dire examination. **TR-5/11/00 @ 106:15-25.** He told the jury:

> ...the State's proof, as the law tells us, is the issue itself, and that is what you must determine, and it is difficult, and the law--perhaps it can't be clearer. It would be nice if it could be. Justice Stewart, who is a Supreme Court Justice, well, back in the sixties, I think it was there longer than that, but in the sixties there was a comment he made about obscenity, and he said, I can't define it, but I

> know it when I see it. And, fortunately, or unfortunately, that is what the obscenity harmful to minor statutes are. It is what you decide as a community standard is harmful to minors.
>
> **TR-5/16/00 @ 56:12-25**

Appellant's trial counsel filed numerous pretrial motions challenging the statute for vagueness and overbreadth. **IA-12, 13, 19, 53, 187, 188, 272.** The record is clear that Appellant made attempts to change his newspaper after the implementation of the new statute but apparently did not do enough to satisfy the County Attorney. **Exh.1 (9/18/98)**

Jerome Evenson stands before this court convicted of crimes which the lead detective, the prosecutor, and the trial judge could not figure out or define. The simple truth, from the mouths of virtually everyone connected with this case, is that not one person – the prosecutor, judge, or police officers, by their own admissions – know the meaning of this law, yet the Appellant, a non-lawyer, is supposed to have fair notice of its meaning.

The Appellant, like all other publishers, cannot operate in a vacuum. Publishers are all aware of what is available in the community and nation. They must take all that information into account when measuring "contemporary standards." This new law depends on a description of "harmful to minors" drafted in 1964. The standards of decency have changed dramatically over those years for adults and minors. Standards change gradually, and that is just one of the reasons for our Constitution's First Amendment -- to allow the media to change with the times

without dictates from government or those who disagree.

To be charged with a crime, the Appellant had a constitutional right to know what the crime was – in advance. It is difficult to imagine anything more chilling to the First Amendment than the standards and criteria applied in this case. The Appellant now has to edit and publish his newspaper with the invisible censorship hand of the County Attorney staring over his shoulders.. He, and all other publishers, remain at the censorship mercy of any prosecutor who might choose, on a given week, to silence the voice of the press.

Is it any wonder that the first jury trial vote was 9-3 for acquittal, and that the second jury, on identical facts, voted for conviction. What is it that Mr. Evenson did to violate A.R.S. § 13-3513? Was he prosecuted because there were female models and dancers depicted in his newspaper with bare breasts? A recent federal court ruling allowed topless women to march in protest in New York. Is Mr. Evenson permitted to publish a photograph of the topless protesters in his newspaper? Are bare breasted photo's permissible in reporting news events, but prohibited in advertising?

A statute is over-inclusive when classes of people, unaware that their conduct may be perceived as criminal, and without fair notice of particular substantive criminal elements that would otherwise subject them to prosecution, stand at risk of being prosecuted for a crime. If a citizen complains about the Starr Report being printed and published in the Arizona Republic, and purchased by his minor child from a vending machine rack, is the editor, the note editor, the rack delivery man, or others connected with the newspaper subject to prosecution? If Mr. Evenson covers the breasts of females in his publication, can he be assured that he will not be prosecuted in the future; or must he take his chances as to the varying attitudes of jurors and their retroactive findings?

To avoid being unconstitutionally vague, a statute must provide clear and adequate notice of the activity it prohibits. Although the Constitution does not impose "impossible standards of clarity" on Congress or State Legislatures, ordinary people should understand the prohibitions, and the statute should not encourage arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 361 (1983). With First Amendment issues, the undesirable effect of self-

censorship makes this a heightened concern. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The United States Supreme Court has demanded specificity in statutes to protect against this precise type of danger to common citizens. See *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (citing *Coates v. Cincinnati*, 402 U.S. 611 (1971). More recently, in *U. S. v. Jones*, 10 F.3d 901 (10th Cir. 1993), *U. S. v. Coiro*, 922 F.2d 1008 (2nd Cir. 1991), *U. S. v. Tabara*, 982 F.2d 100 (3rd Cir. 1992) all ruled that where there is ambiguity in a criminal statute, doubts must be resolved in favor of defendant and it applies to prohibitions as well as penalties. The 6th Circuit Court, in 1998, in *U. S. v. Kassouf*, 144 F.3d 952, held that courts should interpret statutes that impose criminal liability narrowly to ensure proper notice to the accused. In the case of *U. S. v. Mankowski*, 120 F.3d 1078 (9th Cir. 1997), the 9th Circuit held that the due process clause of the U. S. Constitution requires a statute to be sufficiently clear so as to not cause persons of common intelligence necessarily to guess at its meaning and to differ in its application.

To sustain Appellant's conviction, based upon the ambiguity of this statute, would be unconscionable. The statute is unconstitutional vague and overbroad and unconstitutionally chills the freedoms of speech and press.

III. DID THE TRIAL JUDGE'S IMPOSITION OF AN EXCESSIVE AND ARBITRARY FINE FURTHER SERVE TO CHILL PUBLISHERS FIRST AMENDMENT RIGHTS?

If, as Detective Lythgoe implied, the City had a larger storage facility, would the city have seized all of Mr. Evenson's news racks? He stated, in response to a question:

> We just found five machines that were somewhat spread throughout the City of Mesa. We chose to not get all 17 machines just because of the issue of storage and they take up a lot of space.
>
> **TR-5/15/00 @ 145:17-20**

An over-zealous prosecutor, or police officer, if he had the storage space, could have filed 235 criminal complaints on exactly the same evidence. The prosecutor even recognized the overreaching of the indictment by requesting the trial jury to at least convict on some counts if they felt there was overreaching. **TR-5/16/00 @ 62:11-63:21.**

Using the judge's line of reasoning for determining the fine, the fine could have been in excess of $3 million had Appellant been charged on each of his racks. That is such a staggering prospect that it puts a chilling effect on all newspaper publishers. The existing fine of $8,000 per news rack, plus 60% surcharges, violates the 8th Amendment laws against cruel and unusual punishment. *In Re Lynch,* 8 Cal 3d 410, 105 Cal Rptr 217, 503 P. 2d 921 (1972); *People v. Diaz* 179 Misc. 2d 946, 686 N.Y.S.2d 595 (Sup. Ct. 1999). As noted in *State v. Day,* 148 Ariz. 490, 715 P. 2d 743 (1986), in determining whether a punishment is so disproportionate to the offense as to be cruel and unusual, consideration is to be given to the degree or danger which the offense and the offender present to society, to punishments prescribed in the same jurisdiction for more serious offenses, and to punishments prescribed for the same offense in other jurisdictions.

If this sentence stands, it sends a message to the

County Attorney to take 30 racks or 50 racks the next time he seeks to silence the voice of a publisher/detractor. It will take only one seizure for one paper to forever silence the voice of an unpopular voice from the press.

IV. SHOULD THE ACTIONS OF THE COUNTY ATTORNEY'S OFFICE BE THE SUBJECT OF "SPECIAL SCRUTINY" WHEN WEIGHING THE CHILLING ACTIONS AGAINST A POLITICALLY UNPOPULAR NEMESIS FROM THE PRESS?

A. The actions of the Maricopa County Attorney, in orchestrating a media event for the seizure of news racks, with police officers being ordered to wear ski masks in 115 degree temperatures, should be scrutinized by this court.

The United States Supreme Court, in *Playboy Enterprises*, emphasized the need for special scrutiny in free speech cases. It is the Appellant's belief that this scrutiny should focus towards the actions of the Maricopa County Attorney.

It is apparent from the record that the actions directed against Appellant went far beyond boundaries of propriety and were designed and calculated to chill the Appellant's editorial critiques, discouraged his readers from buying the newspaper and possibly created a media event for the County Attorney's own aggrandizement. Contrary to normal prosecutorial protocol, the TV and other media were notified prior to the time of the seizure, and invited to attend the execution of the first search warrant, with the County Attorney on hand. Where typical police search warrant

affidavits are sealed so that police agencies can work under the element of surprise, the County Attorney's Office, according to the lead detective, created a media frenzy by tipping off television stations and the print media to the seizure. In this *carnival atmosphere*, undercover police detectives were ordered to wear "ski masks" and were diverted from their normal procedures to create an attraction which would feed that media frenzy. There is something chilling in the fact that a newspaper and news rack are seized by six masked police officers wearing ski masks in the presence of television and print media.

In the case of *U.S. v. Ellison*, 193 F.2d 942 (8th Cir. 1986), the court held that it was an outrageous act of government to use approximately 300 agents to execute a search warrant for one individual. The County Attorney did not have 300 officers, but was it necessary to have six undercover, ski-masked officers to serve a single warrant on an inanimate object tied to a pole? Obviously, they did not expect an adult to be on hand to give them resistance.

These actions of the County Attorney's office run against the very grain of normal prosecutorial protocol. More importantly, they send a chilling message to those in the media who might serve the reading preferences of an adult minority within our population. The actions of the County Attorney not only tainted this trial, and were a part of the evidence and arguments of counsel. **TR-5/16/00 @ 48:18-49:12; TR-5/16/00 @ 57:1-18** There was no need for the County Attorney to conduct a media spectacle designed to tarnish Appellant's right to sell his paper, to cause his racks to be fair game for public zealots, and to impede appellant's right to receive a fair trial as a result of the chilling images of ski-masked agents seizing newspapers and newspaper racks in a democracy.

V. IS A.R.S. §13-3513 "OVERBROAD" BECAUSE IT FAILS TO NARROW ITS APPLICATION TO THOSE REASONABLY CAPABLE OF PURCHASING NEWSPAPERS FROM COIN OPERATED VENDING MACHINES?

During the course of pretrial hearings, and during the time for settling instructions, serious damage was done to the "fair trial" rights of the Appellant because of the failure of the trial court to properly limit consideration of the protected class to those who would reasonably have the maturity and sophistication to access a coin operated vending machine. One of the serious constitutional defects in the statute was the failure of the legislature to distinguish between small children and older minors. The mischief which the legislature purportedly sought to punish was the availability of the allegedly harmful Beat newspaper, always sold at a price of 50¢, being available for purchase by a minor from a news rack. However, certain classes of minors could not or should not have been rationally included within that definition.

In reviewing the voir dire, it is readily apparent that many of the prospective jurors who voiced concerns about publications like the *Beat* perceived that the statute should be considered with small children in mind. In other words, they perceived their duty to be to evaluate the "harm" from the eyes of a small child exposed to the newspaper. **See TR-5/11/00 @ 42:25; 43:13; 45:25**

During voir dire examination, the judge incorrectly instructed the jury on the standard they must use to decide this case:

The Court: You'll be asked to judge whether or not, applying the

contemporary State standards in August of '97 in this material, among other things, you have to decide if it fit the definition of harm to children, if it is.

Juror Rudy: But they could get their hands on it. That's what I mean.

Court: I think that is what the statute is designed to prevent, yes, children having access to material deemed harmful.

Juror Rude: Material, yes.

Court: The issue in the case is: Is the material harmful to children? This is one of the issues. You can decide whether or not it is harmful to children even though you have children or grand children.

TR-5/11/00 @ 47:20-48:8

It was grossly unfair and misleading for the court to suggest that this law was targeted at smaller children, or should even be measured with small children in mind. Smaller children lack the coordination and sophistication to buy papers from news racks. They could not get the money save and except it was given to them by a parent. Smaller children would not be unsupervised on busy street corners where the racks are located without the supervision of a

parent. The practical effect of this statute is that most children, particularly younger children under 10, would never rationally buy the paper The legislature should have directed that the class of minors targeted for protection should be restricted to those reasonably expected to have the age and maturity to be able to operate a vending machine.

It is patently obvious that citizens would become less concerned about the "harm" of the Beat depending upon the age of a child. If the child is 3 to 12 years old, most people would probably feel that it would be far better to keep adult oriented newspapers away from them. The older the child, the lesser the concern of the newspaper. When children are in their teens, their knowledge and sophistication about sexual matters is significantly greater than it was in their tender years.

It is therefore obvious that the class at greatest risk happens to be the class which would lack the coordination, sophistication and funds to even buy a Beat paper. The legislation sweeps "all" minors into its net; even those minors who could not physically or intellectually ever gain access to the paper.

Judge Hutt recognized a spin-off issue regarding this problem in her minute entry of September 21, 1998. The issue was whether A.R.S. §13:3513 was "over-broad" by failing to narrow its application within the group of protected persons. In denying Appellant's motion to dismiss on that ground, the judge at least recognized that the ages of the protected class should be distinguished and recognized. She ruled:

> ...if a work is found to have serious literary, artistic, political or scientific value for a

> legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole...
>
> 919 F.2d 1505.
>
> It is thus the State's burden to show that the material is harmful to the group as a whole. If part of the group, such as a reasonable seventeen year-old would find serious value in the material, then the material is not harmful to minors. *Pope v. Illinois,* 418 U.S. 497 (1987). **IA-67, 69**

The problem for the State in this case is that the legislative classification, which includes all minors from birth to age 18, unfairly includes those who could not possibly gain access to the vending machines. Since jurors were instructed to include this "small child" class in their consideration, the instructions were erroneous and the case must be reversed.

VI. WAS THE DEFENDANT DENIED HIS STATUTORY RIGHTS TO A SPEEDY TRIAL UNDER RULE 8.2 (a), ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 8.2(a), Arizona Rules of Criminal Procedure, entitles a defendant to a speedy trial within 150 days of the arrest or service of summons. A motion to dismiss was timely filed on April 21, 1998. **IA-37.**

On September 8, 1997, Appellant received a summons which did not comport with the requirements of Rule 3.2 (b) of the Arizona Rules of Criminal Procedure. On September

18, 1997, Appellant appeared involuntarily for his arraignment. On October 31, 1997, defense motions were filed. A status conference was then held on November 3, 1997. The State filed its responses to the motions on December 2, 1997. Mr. Evenson filed his replies in December and next filed a request to proceed pro se on January 15, 1998. The time excluded for Rule 8 purposes were from November 3, 1997 through December 1, 1997, from December 1, 1997 through January 30, 1998, and from April 1, 19987 through May 11, 1998. Appellant Evenson vehemently objected to the exclusion of time from April 1, 1998 through May 11, 1998. The trial court was required to dismiss this case based upon the lack of speedy trial under Rule 8.2, Arizona Rules of Criminal Procedure.

A transcript of the pretrial conference of April 1, 1998 was attached to the reply of Mr. Evenson's motion to dismiss. See **IA- 47.** The transcript reveals that the state had argued that the exclusion of time from April 1, 1998 through May 11, 1998 was proper and that Appellant was being brought to trial 25 days less than the 150 days required under Rule 8.2(a). That 40 day exclusion was improper because Appellant was ready for trial and objected to the exclusion of time. The courts grant of the excluded time was fatal because the trial judge failed to set forth reasons for excluding time.

During the pretrial conference of April 1, 1998, Mr. Evenson, appearing pro per, told the court that he was ready to proceed to trial. (Attachment, p. 2). He moved to dismiss his prosecution because of the unreasonable delays that had been incurred up to that date. Rule 8.5(b) requires that the court provide "specific reasons" for the continuance of record. The trial judge only stated that "extraordinary circumstances" existed for justifying the delay. *Shultz v. Peterson*, 111 Ariz. 421, 422, 531 P. 2d 1128, 1129 (1975) requires that a judge

must specifically enumerate facts explaining why circumstances are extraordinary, justifying such a delay.

If one uses the time period urged by the state (150 days), the improper exclusion was indeed fatal. The trial date of May 11, 1998 was 248 days from the time of service of the summons on September 8, 1997. The valid exclusions are from November 3, 1997 through December 1, 1997, (28 days) and from December 1, 1997 through January 30, 1998 (60 days), totalling 88 excluded days. With a trial date of May 11, 1998, Mr. Evenson would have been brought to trial in 157 days, which is 7 days more than the time allowed by Rule 8.2 (a).

In the superior court, the state argued that Mr. Evenson's claim should be deemed untimely and waived because he did not file his motion to dismiss at least 20 days before trial (Index, Item 44, page 3). The case cited by the state, *State v. Lee*, 25 Ariz. App. 220, 225, 542 P. 2d 413, 418 (1975) did not save their claim. In *Lee*, it was held that a defendant must move to dismiss no later than 20 days prior to trial when the issue is ripe for determination or it would be deemed waived.

Appellant's motion was timely filed under the circumstances because Appellant first filed the motion 20 days before trial and then later refiled the motion pursuant to the Court's order. During the April 1, 1998 pretrial conference, the Court told Mr. Evenson it would consider his speedy trial claim if he filed a written motion. **(Attachment to IA-47, p. 4, lines 13-22).** Mr. Evenson responded that he would hire an attorney. The motion was filed on April 21, 1998, pursuant to the court's deadline. The court subsequently ordered that Mr. Evenson have his new counsel file a notice of appearance and then refile the motion. The

identical motion was refiled on May 6, 1998.

On May 20, 1998, the date set for the firm trial date, the motion to dismiss based upon the speedy trial violations was denied. It was clear that the Appellant's statutory right to a speedy trial was denied and the action should have been dismissed.

There were two other instances where the Appellant was subjected to unconscionable delays. Appellant's prior counsel had moved to dismiss 14 of the 15 counts of the indictment. That motion was granted. The state filed a notice of appeal. *State v. Evenson, 1 CA-CR98-0819.* The Appellant, realizing that his case would be tied up in court for a considerable time period, terminated the services of his prior counsel and requested that the court vacate the dismissal of the 14 counts and reinstate the dismissed counts. The decision acknowledges that Appellee "failed to submit an answering brief on appeal.." (page 5 of memorandum decision). On October 26, 1998, Appellant, acting pro per, filed a motion to vacate the findings to sever counts 2 through 15. **IA-99**. No action was taken on Appellant's request. Appellant's right to a speedy trial sat in limbo until August of 1999, when the Court of Appeals mandate came down reinstating the counts. Since the Appellant was requesting reinstatement of the very counts which served as the basis of the appeal, the state, by nonetheless going forward, denied Appellant his right to a speedy trial.

Indeed, *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct 2182 (1972) provides a 4-part test for determining whether a defendant has been denied his right to a speedy trial. The test directs courts to consider (1) the length of delay; (2) the Reason for the delay; (3) Assertion of his right to a speedy trial: (4) Prejudice to the defendant. The delay on the appeal

alone was over ten (10) months. Since Appellant was offering the state everything it had lost, there was no conceivable reason why the state should not have withdrawn its appeal. Defendant had previously made it clear that he desired a speedy trial. In fact, when the motion to dismiss was granted, Appellant had filed his requested voir dire questions in anticipation of trial. **IA-97.** Appellant's trial had been set for October of 1998. The trial was vacated when the state appealed. The delay made it that much more difficult for a jury, sitting in 2000, to judge standards as they existed in 1997. The denial violated both the 6th amendment right to speedy trial and the statutory right under Arizona Rules of Criminal Procedure.

VII. DID THE CLOSING ARGUMENTS OF THE DEPUTY PROSECUTOR CREATE FUNDAMENTAL ERROR AND CONSTITUTE PROSECUTORIAL MISCONDUCT, MANDATING A REVERSAL OF THIS CONVICTION.

The deputy prosecutor, in his reply arguments to the jury, made inflammatory and improper comments, denying Appellant his right to a fair trial. His argument went beyond the issue of guilt or innocence, but made it one in which the future of criminal prosecutions would be judged. The argument was grotesquely improper, affecting fundamental rights of the defendant, and denying Appellant a fair trial.

Mr. Campagnolo: The verdict you send, and the State knows how difficult it is in this case, but the State is asking for a verdict. There are three

> verdicts that you could come back with.
>
> The first one would be a message to the state. You could find the defendant not guilty, and that would tell the State, I mean, Mr. Romley, or whoever the county attorney is, could still say, I'm against pornography, but that doesn't matter, you can still find him not guilty, and what that would tell the state is don't prosecute it."

TR-5/16/00 @ 60:11-21.

This argument goes far beyond the bounds of propriety. The jury is told that if they acquit, Richard Romley would be receiving instructions from this jury not to prosecute "pornography" cases in the future. The argument got even worse.

> But there are consequences to a verdict, whether it goes either way. The consequences are, first of all, probably (Romley) will not enforce this statute, the statute will probably have no teeth.

> But the other consequence is that it will send a message, not just to Mr. Evenson, but to the Swingers, the Pleasure Guide, you've got free rein, do what you want.
>
> And the problem with that is--there was testimony that there are other publications that sell in stores or don't sell through vending machines that may have worse stuff.
>
> A verdict of not guilty will send a message that those people who, instead of having some protection with adult control in the store, may start putting vending machines out for their stuff too, and you're going to see lots and lots more of these.
>
> **TR-5/16/00 @ 60:22 - 61:13.**

The jury was told, without any evidence, that a "not guilty" verdict would result in more risque publications going out on the street. The prosecutor suggested that their verdict would cause harmful material or even hard core pornography, previously shielded by adult proprietors inside stores and behind counters, to end up in vending machines on the streets, accessible to minors.

Even though Appellant's trial counsel failed to object and move for a mistrial, this argument constituted "plain error." *United States v. Olano,* 507 U.S. 725, 736 (1993). This argument "`seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Young*, 470 U.S. 1, 15 (1985) (quoting *United States v. Atkinson,* (1936)). See generally *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991) (constitutional error may not be found

harmless if error deprives defendant of the "`basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'"

The issue that should have been directed to this jury was whether or not Appellant violated A.R.S. § 13-3513 and was guilty of a crime. The issue was not whether the County Attorney would prosecute future cases, and whether this jury had any role in advising the County Attorney on the propriety of this statute. The issue was whether this newspaper was harmful to minors; not whether a not guilty verdict would cause pornography to be moved from behind counters and out on the streets of Maricopa County. The prosecutor's grossly improper parting shot, directed at Appellant and a group of so-called faceless, nameless merchandisers of pornography, reads:

> But the state asks for a verdict of guilty, because a verdict of guilty well send a message to this publisher, and all publishers like him.
>
> **TR-5/16/00 @ 63: 18-20**

VIII. DID THE TRIAL COURT ERROR IN ITS INSTRUCTIONS TO THE JURY, DENYING APPELLANT HIS RIGHT TO A FAIR TRIAL.

Prior to submitted the case to a jury, the state and defense settled jury instructions. The State requested Jury Instruction 3A. That proposed state instruction contained the following language:

> Merely because something is available in the community does not mean that it is acceptable in the community.

Appellant's attorney, Thomas Thinnes, submitted his own "Contemporary State Standards" instruction which did not contain this language. Mr. Thinnes vigorously objected to the state's instruction. He noted that the state's instruction "is not taken from any other instruction." Mr. Thinnes objection was overruled. **TR-5/16/00 @ 13:18-14:16.** The instruction was given to the jury. **TR-5/16/00 @ 28:22-24.** The instruction was an incorrect statement of the law.

Appellant's counsel attempted to submit an "Agreement of Views" instruction. The proposed instruction, taken from *Commonwealth v. Mascolo*, et. al., 7 Mass. App. Ct. 275, 396 N.E. 2d 1311 (1979) provided:

> If you are unable to agree on what the views of the average person are on the subject of prurient or patent offensiveness, then I instruct you return a verdict of not guilty on all counts.

Mr. Thinnes noted that Judge Dougherty had given a similar instruction in an obscenity case. Mr. Thinnes noted that the instruction had been given in Texas and one other jurisdiction.

Judge Galati ruled that the instruction was "...contrary to what I think is sensible. I don't know of any other area where you--where a failure of a jury to agree on an element of the offense, they're told has to result in an acquittal." **TR-5/16/00 @ 15:14-19.** Over the Appellant's objection, the instruction was refused. The refusal to give the instruction was reversible error.

Appellant's counsel submitted a "Harmful to Minor's" instruction that accurately set forth Arizona law. The judge erroneously used its own preferred instruction rejecting the instruction submitted by Appellant. **TR-5/16/00 @ 16:3-9.** That action denied Appellant his right to a fair trial. The instruction used by the court did not accurately set forth the facts necessary in defining "harmful to minors." (The unreasonable definition of the class, including all minors from birth to 18, was a classic example of the erroneous application of this jury instruction.) See **TR-5/16/00 @ 27:11-28:4.**

Another fundamental error related to 12A of the States first amendment (**TR-5/116/00 @ 18:14-18).** The state had successfully told the jury that "The law is that if it's harmful for minors, it's not protected by the first amendment." As the *Playboy* decision makes clear, obscene material is not protected but indecent material does have substantial first amendment protections. Even though "signal bleed" productions of adult sexual activity was indecent to minors watching such programming, *Playboy* still had protected rights. The prosecution and judge misled the jury in suggesting that this concept was a correct principal of law.

CONCLUSION

For the reasons set forth in this opening brief, Appellant respectfully urges this court to reverse the verdict of the jury and judgment of the trial court and dismiss the charges against Appellant.

RESPECTFULLY SUBMITTED this ___ day of June, 2003.

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Criminal Procedure 31, I certify that the attached brief

X Uses proportionately spaced type of 14 points or more, is double-spaced using a roman font, and contains ____ words; or

____ Uses monospaced type of no more than 10.5 characters per inch and

____ does not exceed 40 pages (opening and answering briefs) or 20 pages (reply briefs); or

____ contains _____ words.

CERTIFICATE OF MAILING

A. MELVIN McDONALD, attorney for the Defendant-Appellant in the above-captioned action, certifies that two copies of the foregoing Opening Brief were mailed this _____ day of June, 2003, to:

Janet Napolitano, Attorney General
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Furthermore, an original and six copies of the Opening Brief were delivered to:

ARIZONA COURT OF APPEALS
Division One
1501 W. Washington Street
Phoenix, Arizona 85007

_____
A. Melvin McDonald

A-105

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, Appellee, vs. JEROME EVENSON, Appellant.	1 CA-CR 00-0621 Maricopa County Superior Court No. CR-97-09901

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QUESTIONS PRESENTED FOR REVIEW

1. Does A.R.S. § 13-3513, which prohibits displaying, offering, or selling material harmful to minors in coin-operated vending machines, violate Appellant's rights under the First Amendment to the United States Constitution by not requiring proof that the materials actually harm minors, when the United States Constitution has no such requirement?

2. Does A.R.S. § 13-3513 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution when the statute is rationally related to its legitimate governmental purposes?

3. Did the trial court violate Appellant's rights under the Eighth Amendment to the United States Constitution by imposing a fine of $166,400 on Appellant for his 13 convictions for selling material harmful to minors in vending machines, when the fine was within statutory limits and was reasonable punishment for his crimes?

4. Should this Court consider Appellant's claim that the State engaged in outrageous conduct in seizing the vending machines, when (A) Appellant waived this claim by never raising it at trial, and (B) the "outrageous government conduct" defense is inapplicable to Appellant's case?

5. Is A.R.S. § 13-3513 unconstitutionally overbroad for failing to distinguish between older and younger minors, when harmfulness to minors must be judged against the whole group of minors?

6. Should Appellant prevail on his claim that the State violated his right to a speedy trial pursuant to Rule 8,

Arizona Rules of Criminal Procedure, and the Sixth Amendment to the United States Constitution, when he waived the claim by not properly seeking appellate review, and suffered no prejudice?

7. Did the prosecutor commit reversible misconduct by explaining that the choice of verdicts sent "messages," when (A) Appellant waived the claim, and (B) the prosecutor's comments were proper and did not deny Appellant a fair trial?

8. Did the trial court err in instructing the jurors about community standards for material harmful to minors, when the instruction accurately stated the law?

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STATEMENT OF THE CASE

I. FACTUAL HISTORY.

In July 1997, the Arizona Legislature prohibited the selling of material harmful to minors through vending machines in public places, unless minors were excluded from the particular place where the vending machine was situated. A.R.S. § 13-3513(A). (R.T. 5/15/00, at 17.) Vendors of material harmful to minors were protected from criminal liability if their vending machines required authorized access cards or special tokens to operate, and if they took reasonable steps to provide those cards or tokens to adults. A.R.S. § 13-3513(B). In August of that year, the Maricopa County Attorney's Office consulted with the police departments of several cities in the Phoenix metropolitan area, and the county attorney and the police departments agreed to cooperate on any investigation and prosecution of any offenders once a complaint was filed. (R.T. 5/15/00, at 16-17.)

On August 21, 1997, "Pete" Nelson stopped at a Circle K at 7th Avenue to buy a publication. (Id. at 53-54, 63; R.T. 5/11/00, Testimony of Alfred Nelson, at 5.) Pete observed a copy of The Beat publication lying on top of the vending machine containing other copies of the publication. (R.T. 5/11/00, Testimony of Alfred Nelson, at 6.) Appellant publishes The Beat. (R.T. 5/15/00, at 89.) Pete picked up the copy and recognized it as "adult" literature. (R.T. 5/11/00, Testimony of Alfred Nelson, at 6.) He noticed that the paper contained pictures of "girls and stuff"; some of the girls had clothes on. (Id.) Pete became concerned that the paper could "get in the hands" of children, who should not see adult magazines. (Id. at 7.)

Pete went home and called the police. *(Id.* at 8.) Phoenix Police Detective White discussed the paper with

Pete, and asked him if he had purchased a copy. (R.T. 5/15/00, at 54.) When Pete told him that he had not bought the paper, Detective White asked him to do so. *(Id.)* Pete bought a copy of *The Beat* the next day, and Detective White met with Pete at Pete's home. (R.T. 5/11/00, Testimony of Alfred Nelson, at 8-9.) Pete identified those portions of the paper that he believed were inappropriate for children, and Detective White marked those portions with asterisks. (R.T. 5/15/00, at 55.) The paper contained photographs of females exposing their breasts and the cleft of their buttocks. *(Id.* at 99.)

Detective White contacted the Chandler and Mesa Police Departments to apprise them of the complaint. *(Id.* at 18-19, 144.) Detective White obtained search warrants to seize vending machines containing copies of *The Beat* in eight locations in Phoenix, two in Chandler, and five in Mesa. *(Id.* at 20—21, 61, 145.) Phoenix, Chandler, and Mesa police officers then seized the machines. *(Id.)* At the first seizure in Phoenix, at 15th Avenue and Indian School Road, the police were met by the Maricopa County Attorney and the media. *(Id.* at 69—71.) Because Detective White and the other officers with him often worked undercover, they wore police-issued hoods to conceal their identities. *(Id.* at 71.) Each vending machine seized contained the same issue Pete Nelson complained about, was in a public location where minors were not excluded, and was operated by placing two quarters in the coin slots. *(Id.* at 22-3 1, 61-99, 145-57.)

II PROCEDURAL HISTORY.

On September 4, 1997, the Maricopa County Grand Jury indicted Appellant on 15 counts of selling or distributing material harmful to minors through vending machines, class 6 felonies. (P.1. at 1.) The summons against Appellant was served on September 8, 1997. *(Id.* at

4.) Appellant moved to dismiss the indictment, claiming that A.R.S. § 13-3513 violated his rights under the First and Fourteenth Amendments to the United States Constitution for a multitude of reasons:

(1) the statute does not require the vendor to know that the material being sold is harmful to minors;

(2) the statute violated the right to equal protection under the laws because it applies to vendors using coin-operated machines but not to purveyors of identical material on television or the internet;

(3) the statute is vague because it does not distinguish between older and younger minors;

(4) the statute is vague because it does not adequately define "material harmful to minors";

(5) the statute allows the trier of fact in a trial to determine the prurient interest" aspect of the definition of "material harmful to minors" according to its standards; and

(6) the statute regulates the content of speech and is not narrowly tailored to achieve the State's goals.

(Id. at 12.) Appellant also contended that the seizure of the vending machines constituted an unconstitutional prior restraint of speech, because the paper had not yet been proved to be harmful to minors. *(Id.* at 3.) Appellant also moved to dismiss all but one of the counts, claiming that selling material harmful to minors in this circumstance constituted a single crime, not 15 separate ones. *(Id.* at 22.)[1]

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[1] Appellee's record on appeal does not contain Appellant's motion. Consequently, Appellee will refer to the State's response to the

The State opposed the motions. *(Id.* at 21-22, 24.) The State acknowledged that it had to prove that Appellant was aware that the material he sold was harmful to minors. *(Id.* at 24.) The State also argued that the statute did not violate equal protection, because the statute applied to all persons who sold the prohibited material in vending machines, and the State had no duty to enact laws that applied to all types of media. *(Id.)* The statute's failure to differentiate between minors based on their age did not invalidate the statute, because jurors would be instructed on the particular age group to which the questioned material is available. *(Id.)* Regarding the argument that the term "material harmful to minors" was vague, the State noted that the statutory definition comported with the United States Supreme Court on the meaning of obscenity. *(Id.)* The State further argued that the "prurient interest" aspect of "material harmful to minors" was properly defined, because the definition required the jurors to judge according to the average person. *(Id.)* The State also rejected Appellant's claim that the statute was not narrowly tailored. *(Id.)* The State further rejected Appellant's claims of "prior restraint," because the State seized only the unsold copies of *The Beat* on the last day that the issue in question was sold. *(Id.* at 21.) The State urged the trial court to reject Appellant's claim that he was improperly charged with 15 separate counts, because he was not being prosecuted for selling one issue of his paper containing material harmful to minors, but for illegally using 15 coin-operated vending machines to sell material harmful to minors. *(Id.* at 22.)

The trial court heard argument and evidence on the motions, and upheld the constitutionality of the statute. (R.T. 9/11/98, at 2; M.E. at 67.) The trial court ruled that the statute required proof that Appellant was aware of the

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motion.

character of the material he sold, and that the statute was not unconstitutional for failing to apply to other types of media. (M.E. at 67.) The trial court also ruled that the statute did not need to differentiate between older and younger minors, because the material must be judged according to minors as a whole group. (Id.) The trial court further ruled that the statutory definition of "material harmful to minors" comported with the decisions of the United States Supreme Court. (Id.) On the issue of prior restraint, the trial court found that the seizure of the vending machines and the unsold copies of the paper did not constitute a prior restraint. (Id.)

The trial court, however, agreed with Appellant that the State should prosecute him for only one count of selling materials harmful to minors. (M.E. at 69.) The State appealed the trial court's ruling, and the trial court stayed trial on the remaining count pending the outcome of the appeal. (Id. at 101; P.1. at 73.) Appellant ordered his counsel to cease representing him, and he moved pro per to vacate the stay and proceed to trial. (P.I. at 33, 95, 99.) The trial court denied the motion. (M.E. at 101.) On May 6, 1998, Appellant retained new counsel, who moved to dismiss the indictment because his speedy trial rights under Rule 8, Arizona Rules of Criminal Procedure, were violated. (P.I. at 37.) Appellant claimed that 40 days should not have been excluded because the trial court had no reason to exclude the time, and that the trial court erroneously found that extraordinary circumstances existed. *(Id.* at 37, 47.) The State opposed the motion, and the trial court denied it. *(Id.* at 44, 47; R.T. 4/1/98.) On July 13, 1999, this Court reversed the trial court's dismissal of the 14 counts, and remanded the case to the trial court. (P.I. at 116.)

Appellant was tried by a jury beginning March 23, 2000, but the jurors could not agree on a verdict and the

trial court declared a mistrial. (M.E. at 151, *185.)* Another trial began on May 11, 2000. (R.T. 5/11/00, Trial Transcript, at 3.) The State presented testimony from Pete Nelson, Detective White, and one police officer each from the Chandler and Mesa Police Departments who were involved in the seizures of the vending machines. (R.T. 5/11/00, Testimony of Alfred Nelson, at 3; R.T. 5/15/00, at 15, 49, 139.) Appellant presented the testimony of his investigator in defense. (R.T. 5/15/00, at 172.)

After the close of evidence, the parties settled jury instructions. (R.T. 5/16/00, at 10-11.) Appellant objected to the trial court's instruction on community standards necessary to judge whether the paper was harmful to minors, arguing that the trial court should not instruct the jurors that "merely because something is available in the community does not mean it's acceptable by the community." *(Id.* at 13-14.) Appellant also objected to the instruction that the jurors must determine whether the material is harmful to minors according to the "average adult applying contemporary state standards." *(Id.* at 14-15.) Appellant requested an instruction stating that the jurors must acquit if they cannot agree on the community standards. (P.I. at 199.) The trial court rejected that instruction. (R.T. 5/16/00, at *15.)*

The trial court then read the jurors their instructions, and counsel made closing arguments. *(Id.* at 20, 32.) Appellant's counsel argued that The Beat publication was within the standards of the community and was no worse than other media available to minors. *(Id.* at 42-44, *53.)* Appellant's counsel also argued that the reason that the State prosecuted Appellant was so that the Maricopa County Attorney could take a political stand against pornography:

The County Attorney is a politician. The County

> Attorney runs for reelection the year 2000. This is an election year.
>
> Well, if you come back with a guilty verdict, this County Attorney can tell everyone in this community that he is anti-obscenity, is in favor of kids.

(Id. at 40.)

In rebuttal, the prosecutor argued that the State was not trying to destroy First Amendment rights, because material harmful to minors is not protected by the First Amendment. *(Id.* at 60.) The prosecutor made the following argument regarding "messages:"

> The first one would be a message to the State. You could find the defendant not guilty, and that would tell the State, I mean, Mr. Romley, or whoever the county attorney is, could still say, I'm against pornography, but that doesn't matter, you can still find him not guilty, and what that would tell the state is don't prosecute it.
>
> But there are consequences to a verdict whether it goes either way. The consequences are, first of all, [sic] probably will not enforce the statute, the statute will probably have no teeth.
>
> But the other consequence is that it will send a message, no tjustto [Appellant], but to the Swingers, the Pleasure Guide, you've got free rein, do what you want.
>
> And the problem with that is—there was testimony about there are other publications that sell in stores or don't sell through vending machines that may have worse stuff.
>
> A verdict of not guilty will send a message that

those people who, instead of having some protection with adult control in the store, may start putting vending machines out for their stuff too, and you're going to see lots and lots more of these.

The second verdict will send a message to the defendant, and to all of those that want to put this kind of material in vending machines, it will tell them, Fine, sell your paper, sell your material, but do it as the law says, put some kind of control on it. These other things have some adult control, whether it's minimal or not, there is some. Here there is none. A verdict of guilty will say, follow the law, please.

(Id. at 60—61.) The prosecutor continued his theme in his conclusion: "The State does ask for a verdict of guilty, because a verdict of guilty well [sic] send a message to this publisher, and all publishers like him." *(Id.* at 63.)

The jurors found Appellant guilty of 13 of the 15 counts. *(Id.* at 69-77.) Appellant moved for a new trial, raising a plethora of arguments. (P.1. at 240, 260.) The trial court heard argument on the motion and denied it. (R.T. 8/14/00, at 3; M.E. at 262.) On August 23, 2000, the trial court suspended Appellant's sentences and placed him on 3 year's probation and fined him $8,000 per conviction, totaling$166,400, including surcharges. (R.T. 8/23/00, at 40.) The trial court permitted Appellant to pay the fine in monthly installments of $2,500. *(Id.)*

Appellant timely appealed his convictions and sentences. (P.I. at 259.) This Court has jurisdiction under Arizona Constitution Article VI, Section 9, and Arizona Revised Statutes §§ 12-120.21(A)(1), 13-403 1, and 13-4033(A).

ARGUMENTS

I

A.R.S.§13-3513, WHICH PROHIBITS DISPLAYING, OFFERING, OR SELLING MATERIAL HARMFUL TO MINORS IN COIN-OPERATED VENDING MACHINES, DOES NOT VIOLATE APPELLANT'S RIGHTS UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BY NOT REQUIRING PROOF THAT THE MATERIALS ACTUALLY HARM MINORS, BECAUSE THE UNITED STATES CONSTITUTION HAS NO SUCH REQUIREMENT.

Appellant contends that § 13-3513, which prohibits displaying, offering, or selling material harmful to minors in coin-operated vending machines, violates his First Amendment rights because no evidence exists that *The Beat* or any similar publication has actually harmed minors. This contention should be rejected because the State was not required to prove that any minor was actually harmed by *The Beat. Crawford v. Lungren,* 96 F.3d 380, 386 (9th Cir. 1996). Whether § 13-3513 is constitutional is a matter of law reviewed *de novo. State v. Korzuch,* 186 Ariz. 190, 192, 920P.2d312, 314 (1996); *State v. Bonnewell,* 196Ariz. 592, ¶5, 2P.3d 682, ¶ 5 (App. 1999). Although normally Appellant would have the burden of proving that the statute is unconstitutional, because the statute regulates the content of speech —speech harmful to minors—the burden falls upon the State to prove its constitutionality. *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, ___, 120 S. Ct. 1878, 1888 (2000).

Contrary to Appellant's claim, the State need not

prove that minors have actually obtained *The Beat* from vending machines for the statute to be constitutional. The State may constitutionally regulate speech based on its content, as long as the State has a "compelling interest" in doing so, and the regulation is the least restrictive means to further that interest. *Sable Communications of California, Inc. v. FCC,* 492 U.S. 115, 126, 1098. Ct. 2829 (1989). Of course, the State must show that the harms it seeks to remedy are real, and that the regulation will in fact alleviate them to a material degree. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States,* 527 U.S. 173, 183, 119 S. Ct. 1923 (1999). But findings and evidence that the regulation is the least restrictive means to remedy the harm are unnecessary where common sense answers the inquiry:

> [Courts] have never said that the legislature must make findings. Findings, or evidence at trial, will be helpful and may even be a desideratum. Their absence can make it much more difficult to determine whether a proposed means is, or is not, the least restrictive. But even in the absence of findings or specific evidence, courts can and will rely on common sense, other statutes, and other cases when it becomes time to consider claims in this area.

Crawford, 96 F.3d at 386. Enacting legislation is not subject to courtroom factfinding. *FCCv. Beach Communications, Inc.,* 508 U.S. *307,* 315, 113 S. Ct. 2096 (1993). Although the First Amendment is paramount, it cannot be a "straitjacket" that "disables government from responding to serious problems." *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 741, 1168. Ct. 2374 (1996).

Section 13-3513 comports with the First Amendment. The Arizona Legislature recognized that a real harm existed: material harmful to minors—sexually-oriented publications such as *The Beat—was* easily accessible to minors at unsupervised vending machines. The State has a "compelling interest in protecting the physical and psychological well-being of minors," which "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable,* 492 U.S. at 492. To achieve that interest and alleviate the harm, the Legislature enacted § 13—35 13, which prohibits the displaying, offering, or selling material harmful to minors through coin-operated vending machines without controls ensuring that only adults may access the machines.

Although the Legislature engaged in no fact-finding inquiry whether such regulation would alleviate the harm to a material, common sense indicates that the statute prevents minors from gaining access to harmful material through the vending machines, and that it is the least restrictive method of achieving that purpose. *See Crawford,* 96 F.3d at 386-88; *see also Sable,* 492 U.S. at 133 (Scalia, J., concurring) ("Neither due process nor the First Amendment requires le2islation to be supported by committee reports, floor debates, or even consideration, but only by a vote.") The statute balances the State's interest in protecting children from the harmful effects of publications such as *The Beat,* with adults' ri2ht to freely purchase that material from vending machines. The statute even indicates the means by which vendors may sell the material in the vending machines to adults while preventing minors from doing so. *See* § 13-3513(B) (vendors may restrict the operation of the machines to access cards or tokens and provide them only to adults). No other method of restricting minors' access to the harmful material achieves the State's goal while preserving adults' First Amendment rights. *Crawford,* 96 F.3d at 387-88.

Section 13-3513 is modeled after a California statute approved by the Ninth Circuit Court of Appeals in *Crawford.* (P.I. at 277.) In that case, the Ninth Circuit recognized that, while the statute regulated speech based on its content, it withstood constitutional challenge because California had a compelling interest in keeping material not obscene but harmful to minors away from minors, and the statute was the least restrictive means to achieve that interest. 96 F.3d at 386. The Ninth Circuit noted that "the legislation on its face appears to be minimally restrictive if its ends are to be accomplished at all." 96 F.3d at 387. The Ninth Circuit explained that

> The statute is effective in limiting children's exposure and has a narrow focus, which still allows adults to purchase the materials from alternative sources in alternative ways. It tightly fits the State's compelling interest.

Id. The court also found that because unsupervised "newsracks" made materials easily available, California could not have fashioned a statute less restrictive than the present one. *Id.* Because the California statute and § 13-3513 are identical, this Court should agree with the Ninth Circuit and find that the statute is constitutional.

Although Appellant takes issue that § 13-3513 is constitutional, he provides no argument that less restrictive means exist to accomplish the State's interest. Appellant argues at great length that the methods set forth in the statute to allow adults to buy *The Beat* but deny them to minors are not workable. But the question is not whether those methods are easily complied with or allow Appellant to earn as much profit as he did before the statute, but whether less restrictive alternatives exist that achieve the State's interest. Appellant is silent on the point, because no

less restrictive means exist.

Appellant also argues that § 13-3513 is unconstitutional in light of the United States Supreme Court's decision in *Playboy*. But that decision has no bearing on the issue in this case. In *Playboy*, Congress had enacted a statute requiring cable operators who provided channels dedicated to sexually-oriented programming to fully scramble or block the channels or to limit transmission to hours when children are unlikely to be viewing television. 120 S. Ct. at 1882. Congress enacted the statute to prevent "signal-bleed," which meant that persons could partially view or hear channels that were blocked to the general public. 120 S. Ct. at 1883. The fear was that children would be exposed to sexually-oriented programming in this way. *Id.*

The United States Supreme Court found that the statute violated the First Amendment because it was not the least restrictive means to achieve the goal of protecting children from such programming. 120 S. Ct. 1893. Congress had enacted a companion statute that required cable operators to fully block certain channels at a household's request. 120 S. Ct. at 1888. The Supreme Court found this companion statute to be a less restrictive means to accomplish Congress's purpose than banning adult programming during the day. 120 S. Ct. at 1888-93. Because the statute in question in *Playboy* was not the least restrictive means to accomplish Congress's goal, while Appellant points to no less restrictive means for the State to accomplish its goal in enacting § 13-3513, the *Playboy* decision has no effect on this case.[2]

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[2] Appellant further argues that the harm to minors from "signal bleeding" in *Playboy* was far greater and far more extensive than the harm from obtaining a copy of *The Beat*. But the comparative degree of harm and its extent is not at issue in this case. The issue is whether,

Section 13-3513 is the least restrictive means to accomplish the State's interest in protecting children from material such as *The Beat.* The statute, therefore, does not violate the First Amendment.

II

A.R.S. § 13-3513 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE STATUTE IS THE LEAST RESTRICTIVE MEANS TO ACCOMPLISH THE STATE'S COMPELLING INTEREST IN PROTECTING CHILDREN FROM HARMFUL PUBLICATIONS.

Appellant contends that §13-3513 violates his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the statute does not apply to other types of media, which he claim offers material much more harmful to minors than his publication. This contention should be rejected because §13-3513 is the least restrictive means to accomplish the State's compelling interest in protecting minors from harmful publications such as *The Beat. Crawford,* 96 F.3d at 386-88. Again, whether § 13-3513 violates the Equal Protection Clause is a matter of law reviewed *de novo,* and because the statute regulates speech based on its content, the State has the burden of proving the statute constitutional. *Playboy,* 1208. Ct. at 1888; *Burson v. Freeman, 504* U.S. 191, 198, 112 S. Ct. 1846 (1992).

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given the harm to minors caused by exposure to publications such as *The Beat* through unsupervised vending machines, § 13-3513 is the least restrictive means to alleviate that harm. The answer is yes.

Section 13-3513 does not violate Appellant's equal protection rights. As with analysis under the First Amendment, a statute regulating the content of speech will not violate equal protection if the State has a compelling interest in alleviating a harm, and the statute is the least restrictive means of achieving the State's interest. *Freeman,* 504 U.S. at 197-98 & n.3, 1128. Ct. at 1850-51 & n.3. As shown in the previous argument, § 13-3513 is the least restrictive means of achieving the State's compelling interest in protecting minors from sexually-oriented publications such as *The Beat. Supra,* at 11-14; *Crawford,* 96 F.3d at 386-88. Thus, § 13-3513 comports with equal protection as well as the First Amendment.

Appellant argues that the statute denies him equal protection because it does not apply to other types of media, such as television or the internet. Appellant's argument must be rejected for two reasons. First, television and the internet are media that span the nation, if not the world, and those media are regulated by the federal government, not states. *See Playboy,* 120 S. Ct. at 1880 (cable television); *Reno v. American Civil Liberties Union,* 521 U.S. 844, *857—58,* 117 S. Ct. 2329 (1997) (internet). The Legislature cannot be blamed for not regulating what it has no power to regulate.

Second, a state legislature is not required to smite all of a state's evils with one fell swoop of its statutory sword:

> This Court has made clear that a legislature need not strike at all evils at the same time or in the same way, and that a legislature may implement its program step by step, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.

Minnesota v. CloverLeaf Creamery Co., 449 U.s. 456, 466, 101 S. Ct. 715 (1981) (citations, internal quotation marks, and internal punctuation omitted); *accord Denver Area Educ. Ass'n*, 518 U.S. at 757 ("Congress need not deal with every problem at once.") To the extent that the Arizona Legislature had jurisdiction to regulate the other media about which Appellant complains, the Equal Protection Clause does not require that it do so for § 13-3513 to be constitutional.

Appellant also argues that the statute violates equal protection because it applies only to those vendors who sell the material and not to those who give it away for free.[3] But while § 13-3513 does not prohibit publishers from giving away their publications to minors, A.R.S. § 13-3506 does. Section 13-3506 even increases the punishment. Violating § 13-3513 is a class 6 felony, while violating § 13-3506 is a class 4 felony. The Legislature was not required to account for every circumstance in one statute. Section 13-3513 does not violate Appellant's equal protection rights.

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[3] Appellant also argues that the statute is unconstitutional because it is vague. (Opening Brief at 39.) Appellant claims that the statute may apply to all persons associated with publishing material harmful to minors, such as reporters, printers, and deliverymen. Although the exact meaning of obscenity has been hotly debated, § 13—35 13 clearly applies only to persons who knowingly "display, sell, or offer to sell" material harmful to minors through vending machines—the publisher, or persons who purchase the material from the publisher to sell. Reporters, editors, photographers, deliverymen, would be excluded from the statute.

III

THE TRIAL COURT DID NOT VIOLATE APPELLANT'S RIGHTS UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY IMPOSING A FINE OF $166,400 ON APPELLANT FOR HIS 13 CONVICTIONS FOR SELLING MATERIAL HARMFUL TO MINORS IN VENDING MACHINES, BECAUSE THE FINE WAS WITHIN STATUTORY LIMITS AND WAS REASONABLE PUNISHMENT FOR HIS CRIMES.

Appellant contends that his fine of $166,400 for 13 convictions constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. This contention should be rejected because the fine was within the statutory limits and was reasonable punishment for his crimes. A.R.S. §13-801; *State v. Miller,* 173 Ariz. 421, 425, 844 P.2d 588, 592 (App. 1992); *State v. Wise,* 164 Ariz. 574, 576, *795* P.2d 217, 219 (App. 1990). This Court should uphold the trial court's imposition of the fine absent an abuse of discretion. *State v. Fillmore,* 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996). A trial court abuses its sentencing discretion only if the sentence "demonstrates arbitrariness, capriciousness, or failure to conduct an adequate investigation into the facts relevant to sentencing." *State v. Baum,* 182 Ariz. 138, 139-40, 893 P.2d 1301, 1302-03 (App. 1995).

The trial court's fine of $166,400 was not excessive and did not violate the Eighth Amendment. A fine is excessive only if it "exceeds reasonable, usual, proper, or just punishment," or is "so disproportionate to the offense that it shocks public sentiment and affronts the judgement

[sic] of reasonable people," or "if it plainly and undoubtedly exceeds any reasonable requirements for redressing the wrong." *Miller,* 173 Ariz. at 425, 844 P.2d at 592 (citations and internal quotation marks omitted); *Wise,* 164 Ariz. at 576, 795 P.2d at 219. The ability to pay the fine is a factor in determining its reasonableness. *Miller,* 173 Ariz. at 425, 844 P.2d at 592.

Applying any of the verbal formulations defining excessive fines, the fine was not excessive. Appellant committed 13 separate violations of § 13_35 13. He did so after being advised by the Maricopa County Attorney to change the nature of his publication or his method of selling his publication to conform to the statute. (P.I. at 284, Exhibit 2.) The crimes were morally serious; the State has a "compelling interest" in shielding children from the material contained in *The Beat. See Sable,* 492 U.S. at 492. Appellant earned more than $17,000 per month on advertising revenues from *The Beat.* (P.I. at 281.) Appellant continued to publish his paper for the length of his prosecution, almost *3* years, earning income during that time. *(Id.)* Appellant presented no evidence about his income to dispute these calculations. (R.T. 8/23/00, at 39.) Moreover, the trial court allowed Appellant to pay the fine by installments of $2,500 per month. (R.T. 8/23/00, at 40.) Appellant can certainly pay the monthly installment from his advertising revenues. The trial court did not abuse its discretion or violate the Eighth Amendment by imposing a fine of $166,400.

IV

THIS COURT SHOULD NOT CONSIDER APPELLANT'S CLAIM THAT THE STATE ENGAGED IN OUTRAGEOUS CONDUCT IN SEIZING THE VENDING MACHINES, BECAUSE (A) APPELLANT WAIVED

THIS CLAIM BY NEVER RAISING IT AT TRIAL, AND (B) THE "OUTRAGEOUS GOVERNMENT CONDUCT" DEFENSE IS INAPPLICABLE TO APPELLANT'S CASE.

Appellant contends that the Maricopa County Attorney acted improperly by orchestrating a media event" when the police officers seized the vending machines. Appellant does not explain how his claim is relevant to whether the machines were validly seized under the Fourth Amendment to the United States Constitution, or to whether he had a fair trial. To the extent that Appellant presents a claim that the State engaged in outrageous government conduct, this contention should be rejected for two reasons.

First, Appellant waived this claim by not raising before or during trial. *State v. Jones,* 188 Ariz. 388, 398, 937 P.2d 310, 320 (1997); *State v. West,* 176 Ariz. 432, 440 862 P.2d 192, 200 (1993). The purpose of the waiver rule is to compel litigants to timely and efficiently present issues to the trial court so that it may correct the error if one has occurred. *State v. Totress,* 107 Ariz. 18, 20, 480 P.2d 668, 670 (1971); *State v. Calabrese, 157* Ariz. 189, 191, 755 P.2d 1177, 1179 (App. 1988). Appellant did not present his claim to the trial court so that it could judge the merits of the claim and take appropriate action. Although Appellant raised the claim in the supplement to his motion for new trial, by then it was too late. (P.I. at 260.) *See Johnson v. Elliot,* 112 Ariz. *57,* 59, 537 P.2d 927, 929 (1975); *Long v. Corvo,* 131 Ariz. 216, 217, *639* P.2d 1041, 1042 (App. 1981) (motion for new trial does not preserve claim if objection at trial was inadequate or improper). Consequently, the claim is waived.

Second, the "outrageous government conduct" defense is inapplicable to Appellant's case. Outrageous

government conduct occurs when the government "creates" the crime for which the defendants are later charged. *See United States v. Franco,* 136 F.3d 622, 629 (9th Cir. 1998). Nothing of the sort happened here. The claim is meritless.

V

A.R.S. §13-3513 IS NOT UNCONSTITUTIONALLY OVERBROAD FOR FAILING TO DISTINGUISH BETWEEN OLDER AND YOUNGER MINORS, BECAUSE HARMFULNESS TO MINORS MUST BE JUDGED AGAINST THE WHOLE GROUP OF MINORS.

Appellant contends that § 13-3513 is unconstitutionally overbroad because it fails to distinguish between older minors, who are capable of operating the vending machines, and younger minors who, Appellant claims, are not. Appellant argues that while his publication may be harmful to younger minors, it is not harmful to older minors, the only ones who have the "sophistication" to use vending machines. Consequently, he argues, the statute is overbroad because it denies older minors access to constitutionally protected speech.

This contention should be rejected because the statute is not overbroad. A statute is overbroad only if it burdens or punishes activities that are not constitutionally protected, but includes within its scope activities that the First Amendment protects. *State v. McLamb,* 188 Ariz. 1, 9, 932 P.2d 266 274 (App. 1996). Although Appellant argues that § 13-3513 improperly prohibits him from selling material that would not be harmful to older minors, he misunderstands the applicable test for whether material is harmful to minors. Material is harmful to minors if, judged by contemporary state standards, it constitutes any

description or representation of nudity, sexual activity, sexual conduct, sexual excitement, or sadomasochistic abuse that (1) appeals to the prurient interest when taken as a whole, (2) portrays the description in an offensive way, and (3) taken a whole has no serious literary, artistic, political, or scientific value for minors. A.R.S. § 13-3501(1). In determining whether material has serious literary, artistic, political, or scientific value for minors, its value must be judged against a reasonable minor, including older minors. *Pope v. Illinois,* 481 U.s. 497, 500—01, 107 5. Ct. 1918 (1987); *American Booksellers v. Webb,* 919 F.2d 1493, 1504-05 (11th Cir. 1990). If *The Beat* has no serious value to a 5-year-old, but it does for a 17-year-old, then it is not material harmful to minors. But that is a question of fact for the jurors to resolve. Because the applicable standard is any reasonable minor within the entire group of minors, regardless of age, the statute need not distinguish between older and younger minors, and the statute is not overbroad.

Appellant argues, however, that the trial court, during voir dire, led the jurors to believe that they had to judge the material according to younger minors, because it used the word "children" instead of "minors." But the trial court's word choice did not suggest small or younger minors. *See* A.R.S. § 8-101(4) ("child" defined as person under eighteen years of age"). Moreover, the issue is not whether the trial court used the legally-exact word in voir dire, but whether the trial court properly instructed the jurors before deliberations. The trial court instructed the jurors to determine the value of the material to minors "taken as a whole." (R.T. 5/16/00, at 27.) If the jurors thought the material had value for 17-year-olds, then they would have acquitted Appellant. The jurors properly applied the statute.

VI

APPELLANT SHOULD NOT PREVAIL ON HIS CLAIM THAT THE STATE VIOLATED HIS RIGHT TO A SPEEDY TRIAL PURSUANT TO RULE 8, ARIZONA RULES OF CRIMINAL PROCEDURE, AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE HE WAIVED THE CLAIM BY NOT PROPERLY SEEKING APPELLATE REVIEW AND SUFFERED NO PREJUDICE.

Appellant contends that the trial court violated his speedy trial rights under Rule 8, Arizona Rules of Criminal Procedure, and the Sixth Amendment to the United States Constitution, claiming that the trial court erred in excluding 40 days from the Rule 8 calculation and in delaying the trial while the State appealed the trial court's dismissal of 14 of the 15 counts. This contention should be rejected because Appellant waived the claim by not seeking appellate review at the time the trial court denied his motion to dismiss for speedy trial violations, and he suffered no prejudice from any delay in the trial. *Boccelli v. State,* 109 Ariz. 287, 508 P.2d 1149 (1973); *State v. Vasko,* 193 Ariz. 142, ¶ 23-29, 971 P.2d 189, ¶ 23-29 (App.1998); *Duron v. Fleischman,* 156 Ariz. 189, 191, 751 P.2d 39, 41 (App. 1988). This Court should uphold the trial court's denial of the motion to dismiss absent a clear abuse of discretion that prejudiced Appellant. *Vasko,* at ¶ 8. An abuse of discretion is "an exercise in discretion which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons." *State v. Woody,* 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992).

This Court should not even consider Appellant's

claim, because he cannot raise it on direct appeal. Petitioning for special action is the appropriate avenue for appellate review of adverse rulings on motions to dismiss for Rule 8 violations. *Vasko* at ¶ 24-28. *See also Boccelli,* 109 Ariz. at 287, 508 P.2d at 1149 (defendant obtained relief for speedy trial violation by special action); *Duron, 156* Ariz. at 191, *751* P.2d at 41 (defendant may seek review of dismissal without prejudice only by special action). If a delay beyond the limits of Rule 8 has prejudiced the defendant, and the trial court nevertheless refuses to dismiss the charges with prejudice, the defendant should seek immediate relief in this Court. *Vasko,* at ¶ 25-26. If the defendant successfully proves that Rule 8 was violated and that the delay prejudiced him, this Court must dismiss the case with prejudice.

The purpose of filing a motion to dismiss under Rule 8 is "to afford a defendant relief from a speedy trial violation *before* his untimely trial." *Id.* at ¶ 25, emphasis in original. Once the trial has occurred and the defendant validly convicted, the issue whether the trial should have been held sooner after arrest is moot. At that point, this Court is unable to provide the defendant with satisfactory relief. If the defendant proves on appeal that his trial occurred in violation of Rule 8 and that the delay prejudiced him, this Court will order the case be dismissed with prejudice. But Appellant has already suffered the harm of enduring a trial that he would not have to endure if he had filed a special action. If the defendant proves a Rule 8 violation without prejudice, this Court's only option is to invalidate a legitimate trial where the defendant was validly found guilty. This result is absurd, because the remedy for an illegally delayed trial is to delay the resolution of the case even longer by retrying it. Rulings on Rule 8 matters consequently should not be raised on appeal, but only on a special action. Consequently, Appellant waived this claim by not filing a petition for special action in this Court.

Even considering the merits of Appellant's claim, however, the trial court correctly excluded the 40 days in question. At the pretrial conference on April 1, 1998, Appellant, proceeding *pro per,* told the trial court that he believed the State had exceeded the time allotted to try him. (R.T. 4/1/98, at 2.) The trial court answered that he should file a motion "to that effect," and Appellant replied that he would hire an attorney to do so. *(Id.)* The trial court asked Appellant if he or his new attorney would try the case, arid he answered, "I don't know, sir." *(Id.* at 3.) The trial court then stated that it was "leery" to set a trial date without consulting the new attorney about his schedule. *(Id.* at 3-4.) The trial court set the trial date for May 11, 1998, and excluded the time for Rule 8 purposes, over Appellant's objection. *(Id.* at 4-5.*)* The trial court found extraordinary circumstances justifying the delay. *(Id.* at 5.)

The trial court was justified in doing so. Appellant had just informed the trial court that he would hire an attorney to represent him but had not yet done so. The trial court had no way of knowing whether an attorney could adequately prepare for trial within a short time, and set a reasonable trial date in that circumstance. Appellant showed no prejudice from the delay, so any dismissal would be without prejudice, accomplishing nothing. Rule 8.6, Ariz. R. Crim. P. The trial court correctly excluded the 40 days from the Rule 8 time.

The trial court's ruling also did not violate Appellant's Sixth Amendment right to a speedy trial. Whether a defendant has been denied a speedy trial under the Sixth Amendment depends on four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has demanded a speedy trial; and (4) the prejudice to the defendant. *Barkerv. Wingo,* 407 U.S. 514, 530-32, 92 S. Ct. 2182 (1992); *State v. Spreitz,* 190 Ariz.

129, 139, 945 P.2d 1260, 1270 (1997). The delay was short: 40 days. The delay occurred because Appellant had decided to retain counsel but had not done so yet. Although Appellant had demanded a speedy trial, he suffered no prejudice for the 40-day delay; Appellant was out of custody and still publishing *The Beat.*

Appellant argues that the true denial of his speedy trial right occurred when the trial court stayed matters pending the State's appeal from the trial court's dismissal of the 14 counts. Although the delay was longer— 10 months—Appellant showed no prejudice from the delay. Again, Appellant was out of custody and publishing his paper. Appellant argues that, because of the delay, the trial did not occur until 2000, nearly 3 years after his indictment. Appellant claims that the delay made it very difficult for the jurors in 2000 to judge what the contemporary standard for material harmful to minors was in 1997. But this is no prejudice at all. Society did not advance or degenerate enough in 3 years for the standard to be significantly, if at all, different. Appellant was not denied his right to a speedy trial under the Sixth Amendment or Rule 8.

VII

THE PROSECUTOR DID NOT COMMIT REVERSIBLE MISCONDUCT BY EXPLAINING THAT THE CHOICE OF VERDICTS SENT "MESSAGES," BECAUSE (A) APPELLANT WAIVED THE CLAIM, AND (B) THE PROSECUTOR'S COMMENTS WERE PROPER AND DID NOT DENY APPELLANT A FAIR TRIAL

Appellant contends that the prosecutor committed misconduct during his rebuttal closing argument by explaining that the verdicts the jurors chose would "send

messages." This contention should be rejected for two reasons. First, Appellant waived any objection to the prosecutor's remarks by failing to timely object at trial. *State v. Trostie,* 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997); *State v. Murray,* 184 Ariz. 9, *35,* 906 P.~d 549 568 (1995). Second, the prosecutor's remarks were proper and did not deny Appellant a fair trial. *State v. McCutcheon,* 159 Ariz. 44, 45, 764 P.2d 1103, 1104 (1988); *State v. Condry,* 114 Ariz. 499, 500, 562 P.2d 379, 380 (1977); *State v. Young,* 109 Ariz. 221,225, 508 P.2d 51, 55(1973); *State v. Church,* 175 Ariz. 104, 107, 854 P.2d 137, 140 (App. 1993). This Court should affirm Appellant's conviction unless the trial court abused its discretion in failing to declare a mistrial on its own motion. *State v. Lee,* 189 Ariz. 608, 616, 944 P.2d1222, 1230 (1997).

A. APPELLANT WAIVED HIS CLAIMS OF PROSECUTORIAL MISCONDUCT BY NOT OBJECTING TO THE ALLEGED MISCONDUCT.

Appellant cannot complain that the prosecutor committed misconduct, because he failed to object to the prosecutor's remarks. Failure to object to prosecutorial misconduct at the time it occurs waives the claim on appeal. *Trostle,* 191 Ariz. at 16, 951 P.2d at 881; *Murray,* 184 Ariz. at 35, 906 P.2d at 568; *State v. Cook,* 170 Ariz. 40, *51,* 821 P.2d 731, 742 (1991); *Church,* 175 Ariz. at 106, 854 P.2d at 139. The purpose of the waiver rule is to compel litigants to timely and efficiently present issues to the trial court so that it may correct the error if one has occurred. *State v. Totress,* 107 Ariz. 18, 20, 480 P.2d 668, 670 (1971); *State v. Calabrese,* 157 Ariz. 189, 191, *755* P.2d 1177, 1179 (App. 1988). Without such a rule, "the system won't work." *State v. Gendron,* 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991).

Appellant's failure to properly object may be excused only if the alleged error is 'fundamental." *Gendron.* 168 Ariz. at 155, 812 P.2d at 628. An error is "fundamental" only if it goes to the "foundation" of the case or denies the defendant a right "essential" to his defense. *Gendron,* 168 Ariz. at 154, 812 P.2d at 627. The prosecutor s statements about "sending messages" did not go to the foundation of the case or deny Appellant any essential right. Appellant's defense was that *The Beat* was not harmful to minors and that the Maricopa County Attorney was on a political witch-hunt in prosecuting him. The prosecutor's comments had no bearing on that defense and did not infringe upon any right essential to present that defense. The prosecutor's comments did not constitute fundamental error, and Appellant's failure to object waived them.

B. THE PROSECUTOR COMMITTED NO MISCONDUCT, BECAUSE HIS COMMENTS WERE PROPER.

Even if Appellant had properly preserved this claim for appeal, the claim is meritless, because the prosecutor's closing argument was proper. A prosecutor's statements do not constitute misconduct unless they call the jurors' attention to matters they would not be justified in considering in determining their verdict. *State v. Hallman,* 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983); *State v. Garcia,* 165 Ariz. 546, 554, 799 P.2d 888, 895 (App. 1990). Moreover, improper comments do not warrant reversal of a defendant's convictions unless they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Hughes,* 193 Ariz. 72, 969 P.2d 1184, ¶ 26 (1998) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)). The conduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (internal quotation marks

and citations omitted). The statements must be so egregious that they deny the defendant a fair trial.[4] *State v. Bolton,* 182 Ariz. 290, 307, 896 P.2d 830, 847 (1995).

The prosecutor's comments did not deny Appellant a fair trial. In his rebuttal closing argument, the prosecutor merely explained the consequences of the possible verdicts to society. A guilty verdict would send a message to Appellant and other publishers of similar material that they needed to conform to § 13-35 13, while a not- guilty verdict would send a message to the County Attorney not to enforce the statute. A prosecutor may comment about the jurors' duty to assist in combating crime and may ask the jurors to "send a message." *State v. Sullivan,* 130 Ariz. 213, 218-19, 635 P.2d 501, 506-07 (1981) ("the State depends on people like you to send a message out to the pushers that this is not going to be permitted anymore and that's why we are here today, to convict the defendant of this"); *State v. Jaramillo,* 110 Ariz. 481, 483, 520 P.2d 1105, 1107 (1974) ("You will never in any of your lifetime have a better opportunity to do something about the drug problem, particularly about heroin sellers, than you've got here today in court."). Drawing inferences "from conditions resulting from the failure to uphold the law" is proper argument. *Jarainillo,* 110 Ariz. at 484, 520 P.2d at 1108. The prosecutor's closing argument comments were proper.

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[4] Because this standard subsumes any question whether any misconduct prejudiced Appellant. Appellee will dispense with a separate argument that the error was harmless. *Compare State v. Bolton,* 182 Ariz. 290, 307, 896 P.2d 830, 847 (1995), *with State v. Luzanilla,* 179 Ariz. 391, 398, 880 P.2d 611, 618 (1994).

XIII

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURORS ABOUT COMMUNITY STANDARDS FOR MATERIAL HARMFUL TO MINORS, BECAUSE THE INSTRUCTION ACCURATELY STATED THE LAW.

Appellant contends that the trial court erred in instructing the jurors in determining what the "contemporary state standards" were in judging whether material is harmful to minors. This contention should be rejected because the trial court correctly instructed on the law. *Hamling v. United States,* 418 U.S. 87, 104-05, 94 5. Ct. 2887 (1974); *United States v. Battista,* 646 F.2d 237, 245 (6th Cir. 1981). Whether the trial court erred in not giving a particular instruction is a question of law subject to *de novo* review. *State v. Orendain,* 188 Ariz. 54, 56, 932P.2d 1325, 1327 (1997); *State v. Virgo,* 190 Ariz. 349, *352,* 947P.2d923, 926 (App. 1997). However, any error in refusing an instruction does not justify reversing a conviction unless the defendant is prejudiced. *State v. Cruz,* 189 Ariz. 29, 31, 938 P.2d 78, 80 (App. 1996).

The trial court properly instructed the jurors on "community standards." Appellant argues that the trial court erred in instructing the jurors that "Merely because something is available in the community does not mean that it is acceptable in the community." (R.T. 5/16/00, at 28.) But this correctly states the law. Whether material meets the statutory definition of material harmful to minors is judged by "the average person, applying community standards." *Roth v. United States,* 354 U.S. 476, 488-89, 77 S. Ct. 1304 (1957). In making this determination, a juror is entitled to draw upon his knowledge of the community from which he comes about the "average person."

Harnling, 418 U.S. at 105. Because the focus of the inquiry is the "average person," the fact that material is available in the community, and might be acceptable to *some* members of the community, does not mean that it is acceptable to the "average person." *See Battista,* 646 F.2d at 245. Otherwise, "contemporary state standards" would not be determined by what the "average person~~ finds acceptable, but by what is actually available in the community, which may be printed or published by a minority of one who is not representative of the community. The instruction correctly stated the law.

Appellant next argues that the trial court should have instructed the jurors that if they could not agree on the "community standards," they had to acquit him. But this proffered instruction has been repeatedly rejected in other jurisdictions. *United States v. Easley,* 927 F.2d 1442, 1450 (8th Cir. 1991); *State v. Taylor,* 664 P.2d 439, 447-49 (Utah *1983); State v. Keaton,* 681 N.E.2d 1375, 1380 (Ohio App.1996); *State v. Davidson,* 481 N.W.2d 51, 59 (Minn. 1992). The proffered instruction misstates the law because, while the jurors must unanimously agree that the material in question violates the "community standards," they do not have to agree on a precise "community standard." *See Taylor,* 664 P.2d at 449 ("each juror makes its own factual determination on the question of whether specific material violates the community standard"). The trial court properly refused it.

Appellant further argues that the trial court misinstructed the jurors on the definition of "material harmful to minors," because the trial court did not distinguish between older and younger minors. The trial court correctly recited the definition of "material harmful to minors" from the definitional statute, §13-3501 and, as previously noted, the trial court was not required to distinguish between older and younger minors. The trial

court properly instructed the jurors.

CONCLUSION

For these reasons, Appellee respectfully requests that this Court affirm the judgments and sentences of the trial court.

Respectfully submitted,

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Pursuant to Rule 31.13, Arizona Rules of Criminal Procedure, undersigned counsel certifies that this brief is double spaced, uses a 14-point CG Times proportionately-spaced typeface, and contains **8,463** words.

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A-150

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,

Plaintiff/Appellee,

vs.

JEROME EVENSON,

Defendants/Appellants.

1 CA-CR 00-0621
Department B

MARICOPA COUNTY
Superior Court
No. CR 97-09901

APPELLANTS' REPLY BRIEF

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COMES NOW Appellant, Jerome Evenson, by and through his counsel undersigned, and respectfully replies to the Appellee State's answering brief.

INTRODUCTION

The Appellee's response leaves undisputed or unchallenged many critically relevant facts and arguments which mandate reversal of this conviction.

1. The appellee does not dispute that the content-based *Beat* newspaper is, at worst, indecent, not obscene, and that first amendment statutes like A.R.S. § 13-3513 must be judged under rigid and strict constitutional guidelines. (p. 10) The appellee concedes that the government bears the heavy burden of proving that this penal statute is "constitutional," that the facts supporting this press and speech prohibition are "compelling" (p. 10) and *that the harms it seeks to remedy are real.* (p. 10)

2. Appellee acknowledges that the Legislature did not engage in any type of "fact-finding" inquiry before implementing A.R.S. § 13-3513 in 1997. (p. 11, lines 17-18)

3. Appellee concedes that no police agency or prosecution agency presented evidence that the *Beat*, sold from newspaper racks, was finding its way into the hands of minors. Appellee argues that these types of huge evidentiary gaps can be merely filled in by judges under the auspices of "common sense." (p.11)

4. It is not disputed that the legislature enacted a penal law which criminalized the activities of a newspaper publisher who, when charged, had compiled a thirty (30) year

publishing track record of *similar* weekly publications *without incident*. There have never been any criminal charges filed against appellant prior to this case even though A.R.S. § 13-3506 (making it a crime to distribute harmful materials to minors) and A.R.S. § 13-3507 (making it a crime to display materials harmful to minors in news racks) had been on the books for well over a decade.

5. The Appellee, with access to a multi-million population within Maricopa County, and with a thirty-year history involving hundreds of thousands of newspaper sales, did not dispute that the prosecution failed to produce a single minor victim known to have purchased or gained access to the *Beat* newspaper from any of the prohibited racks. In other words, Maricopa County, with its 43 cities and over two dozen police agencies trained in the science of investigating crime, has been unable to produce any evidence (police observations, video surveillance, lay witness observations) that even one minor has ever purchased or possessed this newspaper from any of 200 racks in its 30+ year history. The state justifies this void by claiming that they are not required to prove harm in the use of news racks by minors. (p. 9)

6. There was no showing, at the legislature or in the trial court, that news racks selling the "*Beat*" attract minors. This case involves only "make believe" hypothetical, imaginary, non-existent youth who the law "pretends" could have been harmed by buying these constitutionally protected newspapers marketed solely and exclusively to adults.

7. There was no expert testimony, at the legislature or in the trial court, that the content of materials commonly displayed in the *Beat* would create or cause psychological harm to minors exposed to such materials.

8. Appellee does not challenge the claim that there is a tidal wave of material readily available to minors through television, cable, the internet, movie theaters, record stores, book stores and public libraries that is far more harmful in its content than any materials commonly found in the *Beat* newspaper.

9. Appellee has conceded that the *Playboy Enterprises* decision requires this court to evaluate content-based statutes like A.R.S. § 13-3513 using "strict scrutiny." Appellee does not dispute that such statutes, under *Playboy,* are "presumptively invalid," that harms sanctioned by content-based criminal statutes must be "real," and that it will be rare for content-based statutes to "ever be permissible."

ARGUMENT

I. APPELLEE CLAIMS THAT NEITHER THE CONSTITUTION NOR A.R.S. §13-3513 REQUIRES PROOF OF ACTUAL HARM TO MINORS, AND THAT GOVERNMENT CAN SILENCE THE PRESS AND FREE EXPRESSION WITH IMAGINARY HARMS. THIS ARGUMENT IS CONSTITUTIONALLY FLAWED. ABSENT ANY EVIDENCE THAT MINORS ARE ACTUALLY ACCESSING NEWS RACKS TO PURCHASE THE BEAT, AND ARE BEING HARMED FROM SUCH ACTIONS, THE LAW MUST BE DECLARED UNCONSTITUTIONAL.

The appellee does not dispute the critical analytical steps mandated in *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1868 (2000) that apply where government seeks to prosecute and criminalize first amendment freedoms of speech and press. The state concedes that, unlike the normal presumptions favoring constitutionality of statutes, the appellee has the compelling burden of proving the constitutionality of the statute. (p. 10, lines 2-6) The appellee further agrees that A.R.S. § 13-3513 is "content-based" (p. 10, line 3; p. 15, lines 17-21) The appellee admits that the constitution requires the state to prove that the harms contemplated by the statute are "real" (p. 10).

> "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction

> will in fact alleviate them to a material degree." *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U. S. 469 at 480 (1989); *U.S. v. Playboy Entertainment Group, supra.*

It is for this reason that the *Playboy* decision held that content-based statutes restricting free speech are "presumptively invalid," and that laws which criminalize speech must be subjected to "strict scrutiny."

While the appellee argues that a state may regulate protected speech in furtherance of a compelling government interest, *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989), appellant denies that there is a compelling government interest. There has never been a compelling government interest in this statute because the legislature failed to document any compelling justification for the statute in the first place.

Wendy's Hamburgers coined a famous ad asking the rhetorical question "Where's the Beef?" Appellant opening brief asked the same basic question – the appellee's brief failed to show any beef. At best, the appellee has provided the court with a bun, but there is no beef in the bun.

1. It cannot show any victims.

2. It cannot show any expert studies showing harm from this publication.

3. It has no evidence showing that youth have ever been attracted to newspaper racks to purchase *Beat* newspapers.

4. It has no evidence that youth have ever actually accessed or purchased newspapers from the racks.

When examining this legislation under standards requiring strict scrutiny, and forcing the state to prove that the harm criminalized by statute was *real* (requiring a showing that there are large numbers of youth purchasing *Beat* newspapers and these newspapers are harming them), the appellee has miserably failed in its heavy burden. Faced with the daunting task of meeting the strict test mandated by the United States Constitution, the appellee dodges its duty by offering two pathetically weak arguments to deflect criticism of a barren legislative and judicial record:

1. The state is not required to prove that any minor was actually harmed; (p. 9)

2. The state need not prove that minors actually obtained *The Beat* from vending machines (p. 10)

How can the Appellee, on one hand, concede that it carries a heavy burden to show "harms...(that) are real" and claim that A.R.S. §13-3513 is a "regulation (which) ... in fact alleviate(s) them to a material degree" (p. 10, lines 13-14) yet, on the other hand, claim that the state need not prove that significant numbers or any minors, have accessed news racks thereby justifying the creation of this statute?

The appellee pins its arguments solely on the case of *Crawford v. Lungren,* 96 F.3d 380 (9th Cir. 1996), a case which, in five years, has <u>never</u> been cited with approval by any appellate court, state or federal. It was a case decided four years prior to landmark decision of *Playboy Enterprises.*

There are four significant points that distinguish *Crawford* from the present case.

1. In *Crawford,* the plaintiff did not argue "knowledge" (the scienter issue) in the lower court, and accordingly, the Ninth Circuit refused to consider that issue. (Id at 389, footnote 6). Appellant Evenson argued scienter in the lower court.

2. In *Crawford,* the plaintiff did not challenge the definition of "harmful matter" in the statute (96 F.3d at 383, footnote 3). Appellant Evenson challenged the definition.

3. There were no equal protection or due process issues raised in *Crawford* in the Federal District Court. As a result, the 9th Circuit expressly declined to consider these critical constitutional issues when deciding that case. (*Id.* at 389, footnote 6) Equal protection and due process are, and always have been, two of the key linchpins of this appeal.

4. Finally, and most importantly, *Crawford* predates the United States Supreme Court's reformulation of the law regarding "content-based" legislation designed to restrict and criminalize free speech. See *Reno v. ACLU,* 117 S. Ct. 2329 (1997); *U.S. v. Playboy Entertainment Group,* supra. In fact, *Playboy* is the leading authority and controlling decision governing this appeal. It is this reformulation of law set forth in *Playboy* which renders obsolete the judicial rationale of the 9th Circuit in *Crawford.*

In *Crawford,* the 9th Circuit, after acknowledging that it had historically required "evidence to demonstrate..." harm in content-based statutes (96 F.3d at 387), engaged in judicial activism to fill in a evidentiary void supporting a need for the

California law. The court overlooked a non-existent factual record and substituted judicial "common sense" in its place. The court complained that "...the California legislature did not make any specific findings... (*Id.* at 386). The court even admitted that "findings, or evidence presented at trial, will be helpful and may even be a desiderium" (*Id.* at 386). The court openly acknowledged that "their absence (legislative findings) can make it much more difficult to determine whether a proposed means is, or is not, the least restrictive." (*Id.* at 386) The *Crawford* court opted to ignore these omissions by judicially legislating this obvious void under the guise of "common sense." This unchecked judicial activism is unacceptable under current United States Supreme Court guidelines. Courts can no longer sacrifice First Amendment rights by upholding statutes which impose draconian criminal penalties like A.R.S. § 13-3513 unless the legislative body has demonstrated through clear demonstrative evidence that the existence of the harm contemplated by the statute is "real" and substantial, and that the remedy is not only the "least restrictive" remedy, but is a remedy whose need is fully justified from a well documented legislative record.[1]

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[1]. The 9th Circuit appears to have seriously backtracked from their rationale in *Crawford*. In *Alameda Books v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000) decided August 28, 2000, the City of Los Angeles passed an ordinance prohibiting adult businesses that sold adult products and provided viewing of adult movies to operate at the same location. The court noted that *Alameda Books* involved a "content-neutral" ordinance, thereby operating under the lesser standard of "intermediate scrutiny". In striking down the ordinance, the 9th Circuit held that the Los Angeles City Council had failed to demonstrate, through competent studies, the legitimacy of the harm contemplated by the ordinance. They found the city was unreasonable to infer, without hard evidence, that a combination bookstore/video store would have harmful secondary effects. Citing *Turner v. Broadcasting System Inc., v. FCC*, 520 U.S. 180, 211 (1997), the court concluded that a critical issue in free speech cases "is

The *Playboy* decision sets forth a two step test for evaluating "content-based" statutes.

1. When government enacts and later seeks to enforce a penal statute affecting speech, it is *required* to establish the *actual existence of the harm* targeted by the statute with relevant evidentiary findings; and

2. Once a harm is clearly and quantitatively established, the Government must further show that the statute imposes the "least restrictive" method to protect against that harm.

Justice Kennedy, writing for the majority in *Playboy*, discussed the mandatory requirement that government prove the existence of a real and documentable problem in order to justify the existence of the statute. *Playboy,* unlike *Crawford,* condemned the barren legislative record, with the high court refusing to accept excuses for a barren legislative record.

> "No support for the restriction can be found in the near barren legislative record relevant to this provision. Section 505 was added to the Act by floor amendment, accompanied by only brief statements, and without committee hearing or debate. ... The question is whether a problem has been proven in this case. We agree that the Government has failed to establish a

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whether the legislative conclusion was reasonable and supported by substantial evidence in the record before (the legislative body.)" The U.S. Supreme Court granted review of this decision on March 5, 2001.

> pervasive nationwide problem ...
> 120 S.Ct. at 1891

'*Playboy* not only required that the government substantiate a genuine problem, but insisted that the targeted harm, once identified, had to be substantial.

> The District Court's thorough discussion exposes a central weakness in the Government's proof: *There is little hard evidence of how widespread or how serious the problem of signal bleed is. Indeed, there is no proof as to how likely any child is to view a discernible explicit image, and no proof of the duration of the bleed or the quality of the pictures or sound.* To say that millions of children are subject to a risk of viewing signal bleed is one thing; to avoid articulating the true nature and extent of the risk is quite another. (*Id.* at 1889)

Unlike *Crawford,* the high court required the government to provide qualitative and quantitative proof supporting the objectives of the statute. In *Playboy*, the Government offered an expert's spreadsheet which estimated that 39 million homes with 29.5 million children had the potential to be exposed to signal bleed. The court rejected this speculation, requiring the government to accurately prove the extent of the harm to children before the statute could be upheld. In striking down the statute, the U.S. Supreme Court held:

> The question is whether an *actual problem* has been *proven* in this case. We agree that the *Government has failed to establish a pervasive, nationwide problem* justifying its nationwide daytime speech ban.

The Appellee in this case, like the government in *Playboy*, has failed to establish a pervasive "statewide problem" justifying the statute. The state is not permitted to hypothecate or guesstimate access by minors of appellant's 200 newspaper racks. The state has had 30 years of weekly sales to build a case. They have extensive police officers and/or police surveillance cameras to scrutinize these racks 24 hours/day to see if there is a genuine problem involving youth. They have an unrestricted police pipeline that could field parental or teacher complaints about the *Beat* newspaper ending up in the hands of minors, if they existed.

Contrary to the state's assertion that they don't need to prove the existence of any youth victims or prove that news racks are instrumental in getting harmful newspapers into the hands of minors, the U.S. Supreme Court mandates proof of the actual problem. Once the problem is proven to exist by clear and compelling evidence, only then you get to the second prong – does the legislation adopt the "least restrictive " means to remedy this verifiable problem. This error of proof is fatal to the A.R.S. § 13-3513, and the conviction must be reversed.

II. THE APPELLEE HAS FAILED TO JUSTIFY THE ARBITRARY ENACTMENT AND IMPLEMENTATION OF A.R.S. § 13-3513. THEIR CLAIM THAT THE EQUAL PROTECTION ISSUES ARE SATISFIED BECAUSE THE STATE PURPORTEDLY ACCOMPLISHED THE LEAST RESTRICTIVE MEANS IN PROTECTING CHILDREN FROM HARM IS INCORRECT UNDER THE FACTS AND LAW.

Appellee correctly notes that the State has the burden of proving that this statute does not violate the equal protection or due process clauses of the 14th amendment. (p. 15) Unfortunately, the appellee hangs its equal protection and due process argument on the same flawed grounds in Section I; to wit, that the equal protection and due process arguments lack merit because the A.R.S. § 13-3513 provides "...the least restrictive means to accomplish the State's compelling interest." (p. 15)

The appellant again cites *Crawford v. Lungren* as its leading authority supporting this argument. (p. 15) That reliance is sorely misplaced. The *Crawford* court, in its published opinion, expressly noted that it was declining to consider equal protection and due process issues because those issues had not been raised or argued in the lower Court. See 96 F.3d at 389, footnote 6. Appellee also argues that Appellant Evenson's reliance on and reference to "comparative harm" is not at issue in this case. (p. 14, Footnote 2). Both arguments are fatally flawed.

A. Equal Protection Issues

The BEAT has been arbitrarily singled out under a

statutory classification system that is void of logic and "common sense." Where has the appellee failed in its burden?

1. The sale of the *Beat* from the news rack is criminalized solely because, under the statute, it is placed in the news rack *and offered for sale*. Placing the identical newspaper in a news rack but making it free eliminates the criminality from the statute. This statutory classification is illogical and arbitrary. The 50¢ charge to open the locking mechanism actually discourages rather than encourages prospective youth who might be desirous of obtaining a copy of the paper. The appellee has failed to explain or prove why this arbitrary classification passes constitutional muster.[2]

2. The legislature, by enacting this statute, has "strained at a gnat, and swallowed a camel." As noted in the opening brief, young people today are exposed to materials which might affect "morals" in every aspect of their life. The appellee's weak excuse for arbitrary state legislative discrimination is that some of the mediums (television and cable) are regulated federally and not by the states. (p. 16)

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[2] Appellee agrees that A.R.S. § 13-3513 criminalizes only sales, ignoring "giving away" the identical paper from an identical rack. The state seeks to justify this arbitrary classification by claiming that A.R.S. § 13-3506 targets those who "give away" harmful products to minors. That argument is untrue.

A.R.S. § 13-3506 has been on the books since the early 1970's. It covers both sale, offers and gifts of materials "harmful to minors." Mr. Evenson sold *Beat* newspapers for almost two decades under the scrutiny of this statute and was never arrested or cited under the law. Since no police or lay witness was able to show of a single instance where any minor had ever accessed appellant's news racks, that law was obviously working.

While television and cable are regulated by the federal government, neither the internet, movie films, movie theaters, record producers, public libraries, magazine publications and other assorted informational mediums are spared from local scrutiny of their actions. The appellee still has failed to answer the question – why is it not arbitrary and capricious for the legislature to enact legislation to criminalize the sale of a weekly newspaper for 50¢ under the auspices of protecting a group which may not exist, while ignoring the open sale of movie tickets to minors without parental supervision, who are admitted to sexually explicit movies with far more specific content. In this example, the state can document each and every day of the week that minors are admitted to such theaters and exposed to vulgar and filthy language and explicit sex and nudity. Children can freely walk in public bookstores and public libraries and read and observe from any shelf materials that are far more explicit and graphic than anything published in the *Beat* newspaper. It is arbitrary and capricious to create criminal statutes which are clearly designed to target this weekly newspaper, while closing one's eyes to the far greater "danger and evil" which could be readily found in any bookstore or library in this state.[3]

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[3]. The state argues that the legislature "is not required to smite all of a state's evils with one fell swoop of its statutory sword." (p.16) Appellant agrees with that general proposition. However, when the sword is drawn and the evil sought to be penalized is identified, the carving cannot arbitrarily exclude those similarly situated, nor can the classification create classes that make no rational or logical sense.

A statute which imposes criminal sanctions to an item if sold, but excuses the sanction for an identical item given away, is an irrational classification. A statute which penalizes a very narrow perceived harm (the *Beat* newspaper being available to minors with 50¢) while ignoring virtually identical and far more damaging harms,is arbitrary and cannot stand.

3. A.R.S. § 13-3513 is not designed to sustain the state's alleged compelling interest "by the least restrictive means." It is easy for the legislature or the courts or the police to determine whether minors under 18 are gaining admittance to sexually explicit movies without the knowledge or permission of their parents. Surveillance at movie theaters can easily and readily establish whether a perceived harm actually exists. The same fact is true with news racks. As noted in Section I, the government has never demonstrated that the news racks pose any harm to minors, nor have they shown that minors are purchasing, or have any interest in the newspaper.

The burden of proving "less restrictive means" rests with the state. The state's own ineptitude in gathering facts has made it *impossible* for *the state* to prove whether or not there is a less restrictive means to protect minors. If the state had done a minimal job in investigating appellant, they may well have found that the elimination of news racks to be totally unnecessary because of a total lack of interest by youth. Even assuming for purposes of argument that a thorough investigation found significant usage at five of 200 racks, elimination of news racks at certain limited locations where it was found that youth actually purchase the paper would be a "less restrictive" remedy for those adults wanting to purchase the *Beat* than the implementing globally annihilating legislation that virtually guts appellants ability to market his newspapers. Because of this inept investigation, the appellee has totally failed to carry its burden of proving that this blanket prohibition, which affects all 200+ racks, is the "least restrictive remedy" available to the state.

There is a "less restrictive" means already available to

appellee in the criminal code which the state failed to address when implementing this legislation. A.R.S. § 13-3506 makes it a crime for any person to offer or furnish harmful materials to minors. A.R.S. § 13-3507 makes it a crime to place material "harmful to minors" on public display in newsstands, vending machines or display racks. These laws have been on the books since the early 1970's and have undergone numerous amendments. There has never been any showing, at the legislature or at the trial level, that these laws were ineffective in preventing minors from accessing news racks. The burden rests with the state to show that newspapers "harmful to minors" are actually getting into their hands, thereby demonstrating that A.R.S. § § 13-3506 and 13-3507 are ineffective. The only evidence at trial from police officials suggested that the earlier laws were working since no police witness had ever received a complaint that minors were in possession of *Beat* newspapers.

> When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals. *U.S. vs. Playboy* at 1888.

The appellee has failed to sustain its burden by overcoming these less restrictive alternatives and, as a result, the statute must fail.

B. Due Process Issues

Appellee has failed to adequately respond to significant due process issues raised in the Opening Brief. It

is critical for this court to compare materials commonly made available to minors when evaluating appellant's culpability under the law. Appellant, familiar with sexually suggestive materials available to youth in public libraries, movie theaters, record stores, book stores, and on television, cable and the internet, had no way of knowing or being placed on notice that a jury of his peers would deem his paper to be "harmful to minors." When appellant looks around and witnesses, from daily experience, the sexually suggestive materials far more explicit than his small newspaper that are readily available to minors, there was no fair way that any court could conclude that he had fair notice that his innocuous newspaper would be later deemed to be harmful to minors.[4]

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[4]. Appellee, in Footnote 3 at page 17, challenges appellant's claim that the statute applies to all persons associated with the delivery process. Appellee argues that "reporters, editors, photographers, (and) deliverymen, would be excluded from the statute." Contrary to appellee's wishful thinking, the statute sweeps into its net the very people that appellee claims are excluded. The statute includes within its scope "any person" who "displays" the offending newspaper. The deliveryman unlocks the coin lock and the display lock, removing the coins and filling the rack with newspapers ready for sale. His employment is vital for delivery of the newspapers to 200 hundred racks in Maricopa County. Reporters, editors, and photographers all contribute content to the paper, knowing that it is planned for sale. A.R.S. § 13-303B(2) provides that any person who "aids, counsels, agrees to aid or attempts to aid another person in planning or engaging in conduct" which constitutes a criminal offense is responsible for the crime. Contrary to appellee's claim, everyone involved in the publishing process falls within the clutches of A.R.S. § 13-3513.

II. THE FINE IMPOSED IN THIS CASE NOT ONLY VIOLATES THE 8TH AMENDMENT, BUT CHILLS FREE SPEECH.

The appellee correctly notes that appellant was convicted of 13 felonies, and that the fine imposed by Judge Galati fell within the statutory range for each count. That argument nonetheless seriously misses the mark.

History teaches us that there are two primary methods of destroying freedom of speech. During the period of the Third Reich, one effective method employed by Nazi terrorists was to defame, arrest and execute the publishers, torch their buildings and smash their presses. History teaches us that there are more subtle ways to destroy free speech which are less violent but equally effective; pass penal statutes which criminalizes free expression, and eventually silence the unpopular voice of the publisher by economically strangling his business operations.

The County Attorney selected 15 racks yielding a gross fine with surcharges of $166,400. The appellant has over 200 racks. Next time, if there is a next time, the County Attorney need only seize all 200 racks and push for the collective fine and surcharges of $2,500,000 to effectively drive appellant or any newspaper out of business. The voice is silenced without a single killing, a single burning, or a single smashing of a printing press. For a single issue distributed to 200 locations, you create 200 separate crimes and 200 separate fines.

While consecutive fines are permissible, they are, as a matter of practice, rarely imposed. The trial judge's fines in this case are outrageous in the extreme. Appellant is

financially crippled because one issue of his newspaper, published for 33 years, is found at a *second* trial to be harmful to minors, even though no minor has ever been known to have seen the newspaper.

The message that this sentence sends is chilling. Publishers like Mr. Evenson must now kowtow to the whims of the Maricopa County Attorney. The County Attorney, not Jerome Evenson, now dictates the content of *The Beat* or similarly situated newspapers.

This sentence has no rational relationship to the crime itself. There is no identifiable victim. There was no act of violence. No victims were deprived of their life savings. No elderly victims were exploited. No minor child was sexually abused or injured as a result of this publication. Appellant published on this particular week a product that had been similar for three decades. One of two juries could not agree on a verdict.

Simple arithmetic illustrates the excessive nature of the fine. The record shows that Mr. Evenson published approximately 10,000 to 12,000 issues weekly. Sales at 50¢ per copy, yields a gross income potential of $5,000 to $6,000. The fine exceeds by thirty times the gross amount of possible sales. Criminal fines are subject to Eighth Amendment analysis. See *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 2913-14, 106 L. Ed. 2d 219 (1989). A fine is excessive if it "exceeds reasonable, usual, proper, or just punishment." *State v. Wise*, 164 Ariz. 574, 576, 795 P. 2d 217, 219 (App. 1990). All the legalistic mumbo jumbo of appellee's counsel cannot avoid this simple conclusion - this punishment for a victimless crime is outrageously excessive, and shockingly disproportionate to the alleged harm done in this community. It shocks the conscience.

IV. THE STATE ENGAGED IN OUTRAGEOUS GOVERNMENT CONDUCT AS A RESULT OF THE MEDIA EVENT STAGED BY THE MARICOPA COUNTY ATTORNEY. HIS ORCHESTRATED RAID BY MASKED AGENTS PERMEATED APPELLANT'S TRIAL, AND DENIED HIM OF A FAIR TRIAL.

The actions surrounding the seizure of the news racks permeated and tainted appellants trial. It was first raised in voir dire by the prosecutor. 5/11/00@108:20-25; prospective jurors later raised concerns about the issue; 5/11/00@113:11 to 114:10; the prosecutor discussed it in his opening statement; 5/11/00@134:24 to 135:9; appellant's defense attorney was forced to discuss the media event; 5/11/00@137:25 to 136:14; and Detective White testified about the outrageous prosecutorial actions of the staged media event; 5/16/00@70:13 to 72:15; 85:21 to 87:20; 108:10 to 109:7; 126:4-18. The video clip was admitted as Exhibit 59 in evidence. 5/15/00@85:22 to 87:9.

Appellee correctly notes that appellant's trial counsel did not challenge the staged media actions of the County Attorney at trial. Appellant concedes that the videotape was admitted without objection, and that the issues were indeed raised as error for the first time in the supplemental motion for new trial. Appellant does not challenge the premise that issues not raised at trial are waived and cannot generally be raised for the first time on appeal. Appellant does believe, and the cases do support the concept that, despite trial counsel's ineffectiveness in failing to challenge these actions, courts have the inherent power to oversee the administration of justice, and that when actions are taken by prosecutors that are designed and calculated to create a media frenzy and

damage appellant's right to fair trial, such actions rise to the level of fundamental error and that appellate courts, in the exercise of their inherent power, can take action sanctioning the state for their inappropriate actions. *State v. Smith*, 114 Ariz. 415, 561 Pl.2d 739 (1977)

V. A.R.S. §13-3513 IS UNCONSTITUTIONAL BECAUSE THE STATUTE FAILS TO DISTINGUISH BETWEEN OLDER AND YOUNGER MINORS.

The appellee's brief totally misconstrues appellant's argument on the arbitrary classification of "minors" under this statute. There are two factors criminalized by A.R.S. §13-3513 – the paper's harm to minors as a class, and the placement of these alleged harmful newspapers in "coin operated news racks." Appellee's response focuses on the first factor (minors as a class) while appellant's focus was on the 2nd issue (those actually capable of purchasing newspapers from coin operated news racks).

The legislature had a duty to enact a statute which properly identified a genuine harm, and to then adequately define the class that might be reasonably threatened by the harm. (See Tussman and tenBrock, The Equal Protection of the Laws, attached as Exhibit A to the opening brief.) There are huge segments of youth who could never rationally be affected by the goals of the statute.

Television or cable can create incredible harm to minors because the images on a television screen are equally visible to infants, small children and teens. When Congress drafted legislation in *Playboy* to protect minors, there was a sound logic in including the *entire class* of minors since

minors of all ages could be exposed to uninvited explicit sexual behavior exposed as a result of "signal bleed." *The Beat* is a newspaper which, by its very nature, requires the reader to be able to read the English language. A huge segment of youth would be excluded from the contents of the paper, because they don't read. To actually access the rack and become exposed to the "alleged harm," a minor must have the maturity and sophistication to be able to read the instructions on a newspaper rack, have the capacity and knowledge to carry two coins, and the coordination to know that they must first put the coins in the rack and then lift it to purchase the paper itself.

It is a virtual certainty that children in their first 8 to 10 years of life would lack the sophistication to access the paper, or the interest in it. The very group of minors that a jury would believe *most at risk* from a newspaper like the *Beat* is the same, identical group that could *never have the maturity, coordination and skills of accessing the rack.* A.R.S. § 13-3513 does not distinguish or differentiate between minors, thereby sweeping into its net an identifiable segment of minors who would and could never be exposed to the harms contemplated by the statute. If the State of Arizona had adequately investigated this case before rushing to indictment, they would have been able to ascertain if any youth accessed these news racks and, if so, which segment of the youth population.

This statute not only fails to use the "least restrictive means" for restricting First Amendment Rights, but has erroneously included a significant group of minors who would never realistically be exposed to the imaginary danger created by the news racks. See *American Bookseller's Assoc. v. Virginia*, 802 F. 2d 691 (4th Cir. 1986).

This error was not a hypothetical problem – it was real. Prospective jurors were not asking questions about a generic group of minors – they were asking questions which expressly referred to their children, grandchildren, nieces and nephews, both young and old. It violates the United States Constitution to include a portion of a class (smaller children) into the definition of the crime where it is legally impossible for that group to be impacted by the law.

VI. APPELLANT WAS DENIED HIS RIGHTS TO A SPEEDY TRIAL. THE DELAY CAUSED INJURY BECAUSE THE DELAY FORCED THE TRIAL JURY TO JUDGE THE NEWSPAPER IN 2000 USING 1997 COMMUNITY STANDARDS.

The Appellee maintains that Appellant was required to challenge the denial of speedy trial rights by Special Action rather than appeal. Appellee further argues that even if appellant was denied a speedy trial, the error was harmless. Appellee finally argues that there was no speedy trial violation.

Speedy trial violations are guaranteed to all people charged with crime both by statute (A.R.S. §13-114(1)) and by criminal rule (Arizona Rules of Criminal Procedure, Rule 8). Appellant timely challenged the trial court's failure to set his case for a speedy trial. The trial judge error in failing to dismiss the prosecution on speedy trial grounds.

Appellee correctly notes that Petitions for Special Action are one important way to challenge speedy trial violations. However, it is not the exclusive way. The case law makes clear that either method for challenging speedy trial rights is acceptable.

In *State v. Tucker*, 133 Ariz. 304, 651 P. 2d 359 (1982), the state argued that the defendant was required to challenge speedy trial violations by bringing a petition for special action and that by failing to bring such a petition, the right was waived. In rejecting this claim, the high court held:

> Although we agree that a special action on speedy trial issues promotes judicial economy, we do not believe appellant waived any rights. First, this Court has often considered speedy trial arguments on appeal and has never required that they be brought by way of special action."

Contrary to appellee's claim of "no harm," appellant believes that the delay caused considerable harm to his rights to a fair trial. The trial judge owed appellant, who at the time was proceeding pro per, a duty to discuss various options, including withdrawal of the dismissal of the 14 counts so he could expedite the trial process. This was not done. *Haines v. Kenner*, 404 U.S. 519, 30 L.Ed. 2d 652, 92 S.Ct. 594 (1972). Rather than have his case tried in close proximity to the indictment, within the same time frame as the indictment, delays pushed consideration of the criminal case back three full years. As a result, the trial jurors were forced to speculate on what community standards may have been in 1997 based upon their individual recall.

VII. THE PROSECUTOR'S *REBUTTAL* ARGUMENT CONSTITUTED FUNDAMENTAL ERROR. THE COMMENTS AND TIMING OF THE ARGUMENTS WERE CALCULATED TO AMBUSH APPELLANT. BECAUSE THEY WERE MADE IN REBUTTAL,

APPELLANT'S COUNSEL COULD NOT COUNTER THEM. THE COMMENTS WERE SO INFLAMMATORY AND INFECTIOUS THAT THEY NEGATED APPELLANT'S CHANCES OF A FAIR TRIAL.

Appellant does not dispute that his trial counsel ineffectively failed to move for mistrial after appellee's rebuttal argument. He further does not challenge the basic principal that error which is not timely challenged is "waived." He does contend that the error in this instance so infected the proceedings that they eliminated any hope of a fair trial or a fair verdict. *State v. Gendron*, 168 Ariz. 153, 812 P. 2d 626 (1991).

The prosecutor, an employee of the Maricopa County Attorney, suggested that a "not guilty" verdict would send a "message" to his employer directing him not to prosecute pornography cases. By using this argument, the prosecutor diverted the jurors' attention away from the evidence and told them that there decision would affect future cases and the County Attorney's decision to prosecute future so-called pornography cases. There was not a shred of evidence that the County Attorney would be influenced by an adverse verdict. He refused to testify, and did not directly participate in the case. The suggestion was outrageously unfair and inflammatory. The message was clear – if you acquit, you, the jurors, will send the message that pornography cases should not be prosecuted in Maricopa County.

The prosecutor, again without any evidence, unfairly suggested that other sex oriented publications would have "free rein" in their publications. He talked about the effect and message of a verdict on publishers of these publications.

This argument played to the passions of jurors, suggesting that they would bear responsibility for the expansion of news racks containing even more harmful materials if they dared to acquit the appellant.

What was particularly outrageous was the suggestion that other publishers who previously sold sexually explicit materials from behind their convenience store counters would suddenly move their inventory to news racks on the street.

These arguments were designed to use blatant tenor tactics to divert the jury from deciding the case based upon the evidence, and to lead them to believe that an adverse decision would open the floodgates of harmful material. The "message" crossed the line and constituted fundamental error. In the first trial, where no similar argument was made, a jury was unable to reach a verdict. Given the terror tactics that the prosecution would not prosecute future cases with this message, and that magazines and newspapers would flood the streets, the jury returned a verdict of "guilty."

> Error is fundamental when it reaches "the foundation of the case or takes from the defendant a right essential to his defense;" or is an 'error of such dimensions that it cannot be said it is possible for the defendant to have a fair trial. *State v. King*, 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988)

VII. THE TRIAL JURY WAS INCORRECTLY INSTRUCTED ON THE LAW THAT SHOULD GOVERN THEIR DELIBERATIONS.

Appellant thoroughly highlighted those instructions improperly given or deleted, and need not spend time or space reiterating those points. However, a brief reply will address several points raised by the appellee.

The trial judge's directive that something "available" in the community did not make it "acceptable" in the community was error. Trial judges frequently lose sight of the fact that the First Amendment protects minority viewpoints and materials often repugnant or offensive to the majority of citizens. The Supreme Court in *Playboy* began its analysis by noting that most adults would find the material on the Playboy channel "highly offensive." Highly offensive speech is nonetheless protected speech, and an instruction that appeals to a majority norm must necessarily fail.

> The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested and expressed. ... The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly. 120 S. Ct at 1893.

Availability of materials should be considered as evidence of their acceptability. The staggering availability of sexually suggestive material on all of the media indeed is evidence of societies acceptance of these materials. The instruction was

improper.

The trial judge similarly erred when he failed to require the jury to agree on which "community standards" were breached by appellant's newspaper. The proposed instruction given in *Commonwealth v. Mascolo*, 7 Mass. App.Ct. 275, 396 N.E. 2 1311 (1979) should be the law in Arizona. The trial judge's instruction on "harmful to minors" similarly misstated the law in Arizona, as did the other jury instructions discussed in the opening brief.

For the reasons set forth in the opening and reply briefs, the conviction of appellant Evenson should be reversed.

RESPECTFULLY SUBMITTED this ___ day of March, 2001.

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By_____

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Criminal Procedure 31, I certify that the attached brief

X Uses proportionately spaced type of 14 points or more, is double-spaced using a roman font, and contains 6924words; or

____ Uses monospaced type of no more than 10.5 characters per inch and

_____ does not exceed 40 pages (opening and answering briefs) or 20 pages (reply briefs); or

____ contains _6924_ words.

CERTIFICATE OF MAILING

A. MELVIN McDONALD, attorney for the Defendant-Appellant in the above-captioned action, certifies that two copies of the foregoing Reply Brief were mailed this 7th day of June, 2003, to:

Janet Napolitano, Attorney General
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Furthermore, an original and six copies of the Reply Brief were delivered to:

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Plaintiff/Appellee, vs. JEROME EVENSON, Defendant/Appellant.	1 CA-CR 00-0621 Department B MARICOPA COUNTY Superior Court No. CR 97-09901

BRIEF OF THE ARIZONA CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Plaintiff/Appellee, vs. COUNTY JEROME EVENSON, Defendant/Appellant.	1 CA-CR 00-0621 Department B MARICOPA Superior Court No. CR 97-09901

BRIEF OF THE ARIZONA CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST

The Arizona Civil Liberties Union (AzCLU), a § 501 (c)(3) non-profit organization, is a statewide affiliate of the American Civil Liberties Union. Since 1959, the AzCLU has advocated for the rights of Arizonans under the United States and Arizona Constitutions, including the rights of freedom of expression threatened in this case. AzCLU has filed numerous briefs *amicus curiae* in state and federal courts. Members of AzCLU are citizens and taxpayers of Arizona who have an interest in the outcome of this criminal appeal. Further, the AzCLU and its

members have an interest in preserving their rights to be free from criminal and civil laws that are unconstitutional or are unconstitutionally applied.

AzCLU has developed special expertise and knowledge of the constitutional issues in the present case. We have associated with students and a law professor at Arizona State University College of Law with expertise and experience in this area who have read the briefs of Defendant/Appellant Evenson (Evenson) and of Plaintiff/Appellee State of Arizona (the State). Written consent of both parties to the filing of this *amicus* brief has been filed with the Clerk of the Court as required by Arizona Rules of Criminal Procedure 31.25(a).

ARGUMENT

I. A.R.S. § 13-3513 MUST BE REVIEWED UNDER STRICT SCRUTINY AND IS UNCONSTITUTIONAL.

A. A.R.S. § 13-3513 is subject to strict scrutiny because it unquestionably is a content-based regulation of protected speech.

The United States Supreme Court's opinion just last term in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), controls this case and conclusively establishes that A.R.S. § 13-35 13 (~ 13-35 13) is both subject to strict judicial scrutiny and fatally deficient under that most demanding standard. *Playboy* involved "signal bleed," the partial, scrambled audio and video reception of sexually explicit adult cable television programming in the homes of non-subscribers to that programming. A federal statute regulated cable channels, such as PLAYBOY'S, that were "primarily dedicated to sexually-oriented programming," but not other channels, such as HBO, that might show similar or identical

programming. *Id.* at 812. Thus, as in this case, *Playboy* involved selective regulation of a particular segment of one medium of mass communication.

The statute invalidated in *Playboy* also targeted very sexually explicit adult television programming and not merely, as here, newspaper photos of topless models. Children of all ages were easily able to access the PLAYBOY CHANNEL even in homes of non-subscribers to that channel. Moreover, the Supreme Court has long been particularly solicitous of the interests of parents when such unwanted material invades the home. *See e.g., FCC v. Pacifica Foundation,* 438 U.S. 726, 748-49 (1978). Nonetheless, the Supreme Court in *Playboy* emphatically reiterated several times that a content-based statute, as was at issue there, "can stand only if it satisfies strict scrutiny." *Playboy,* 529 U.S. at 813, *citing Sable Comm. of Cal., Inc. v. FCC,* 492 U.S. 115, 126 (1989).[1]

Strict scrutiny is the highest standard of judicial review and is mandated because "[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *Playboy,* 529 U.S. at 812. Thus, it is now axiomatic that a statute such as § 13-3513, that regulates speech based on its content, "must be *narrowly tailored* to promote a *compelling* Government interest" and, "[i]f a *less restrictive alternative* would serve the Government's purpose, the legislature *must* use that alternative." *Playboy,* 529 U.S. at 813 (emphasis added), citing *Sable Comm.,* 492

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[1] The Supreme Court's emphatic application of strict scrutiny in *Playboy* is especially significant since the majority was rejecting a lesser standard applied to indecent cable programming by a plurality only a few years earlier. *See Denver Area Educ. Telecomm. Consortium v. FCC,* 518 U.S. 727, 740-43 (1996) (plurality op.).

U.S. at 126 and *Reno v. American Civil Liberties Union,* 521 U.S. 844, 874 (1997).[2]

Moreover, the state bears the heavy burden of actually demonstrating, and not merely asserting, that it is using the least speech restrictive means to further a truly compelling interest. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Playboy, 529* U.S. at 816-17 (citing 6 Supreme Court cases). The State may not rest on a "'mere desire to avoid the discomfort and unpleasantness'" of certain speech, even when the audience is children. *Id.* at 817, *quoting Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 509 (1969). Indeed, "'[c]ontent-based regulations are presumptively invalid' . . . and the government bears the burden to rebut that presumption." *Playboy, 529* U.S. at 817, *quoting R.A.V v. St. Paul,* 505 U.S. 377,382 (1992). Thus, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy,* 529 U.S. at 818.

Neither the strict standard nor the State's heavy burden is at all affected by the fact that some may perceive certain expression - here pictures of topless models - as low

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[2] Given the unfortunate political overtones introduced into this case by the County Attorney, *see* Evenson's Opening Brief (Even. Open. Br.) at 12-13, 47, it is well to recall Justice Souter's admonition that strict judicial scrutiny "keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area,* 518 U.S. at 774 (Souter, J., concurring). Justice Kennedy reiterated this crucial consideration by noting that "strict scrutiny at least confines the balancing process in a manner protective of speech" and against "the apparent exigencies of the day." *Id.* at 784-85 (Kennedy, J., concurring in part, concurring in the judgment in part, dissenting in part).

value speech; the Court has squarely rejected such an approach. *See Playboy,* 529 U.S. at 811, 826 (noting that many adults might consider the PLAYBOY CHANNEL highly offensive, but that "[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens find shabby, offensive, or even ugly"). *See also R.A.V v. St. Paul*, 505 U.S. 377 (1992) (holding that even hate-speech cannot be regulated by impermissibly content-based statutes). Therefore, it is not surprising here that the State has not met and cannot meet its heavy burden of validating § 13-35 13.

There can be no doubt that § 13-35 13 is content-based. On its face it directly restricts speech that the state considers "harmful to minors;" the speech in question is defined by its content. As in *Playboy,* "[t]he overriding justification for the regulation is concern for the effect of the subject matter on young viewers . . . This is the essence of content-based regulation." Playboy, 529 U.S. at 811-12. Amazingly however, the state has not even attempted to meet its heavy burden of justifying § 13-35 13 under strict scrutiny.

B. A.R.S. § 13-3513 fails strict scrutiny because the State has not demonstrated that the statute serves any compelling governmental interest nor that it is narrowly tailored using least restrictive means.

The State surely has a "compelling interest" in protecting the physical and psychological well-being of children. *See Reno,* 521 U.S. at 869; *Denver Area,* 518 U.S. at 755. Such a statement, however, is so general and superficially true as to lack any analytical power. As the Supreme Court noted in *Reno,* "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech

addressed to adults." *Reno,* 521 U.S. at *875. See also Playboy,* 529 U.S. at 824. Even when reviewing non content-based restrictions on speech, the Court refuses to accept that interests "important in the abstract" can in fact justify a particular regulatory burden. *Turner Broad. Sys., Inc. v. FCC, 512* U.S. 622, 664. Most important is the Court's long-standing, fundamental precept that the First Amendment does not allow the State to reduce the free-speech rights of adults to material fit only for children. *See Denver Area,* 518 U.S. at 759; *Sable Comm.,* 492 U.S. at 128; *Bolger v. Youngs Drug Prod. Corp.,* 463 U.S. 60, 73 (1983); *Butler v. Michigan, 352* U.S. 380, 383 (1957).

1. The State has demonstrated no compelling interest addressed by A.R.S. § 13-3513.

In *Playboy,* the Court required the government to demonstrate a compelling interest in regulating signal bleed by a serious showing of the magnitude of the alleged problem, but there was "little hard evidence of how widespread or how serious" that problem was. *Playboy,* 529 U.S. at 819. Despite the highly sexually explicit nature of the television programming invading the homes even of *non*-PLAYBOY subscribers, the Court was directed to no more than a "handful of complaints." *Id.* at 821. The Government, the Court said, "must present more than anecdote and supposition," *id.* at 822, because "[t]he First Amendment requires a more careful assessment and characterization of an evil" to justify the restriction on speech. *Id.* at 819.

Here it apparently is undisputed that there is *no* evidence of *any* harm to minors from material distributed through vending machines, and certainly not from THE BEAT. The Arizona legislature held no hearings on the issue before enacting § 13-3513 and made no findings regarding distribution of expressive materials through vending machines. There is good reason for this; THE BEAT has been published for over 33 years, selling 8,000 to 12,000 issues weekly without complaint or incident. *See* Even. Open. Br. at 6, 15. The criminal investigation here arose out of a single complaint, apparently instigated to some extent by the police. *See id.* at 7-9. As Appellant points out with great force, "there is *no evidence,* anywhere, that any minor has ever seen, let alone purchased, a *Beat* newspaper in its 33 years of existence." Even. Open. Br. at 9 (emphasis in original). Each of the three police officers who testified as the State's only witnesses (aside from the single complainant) also confirmed the total absence of any evidence of any harm to

minors from THE BEAT or from any other material distributed through vending machines. Even. Open. Br. at 9. This evidence is emphatic in its silence on the central issue the State was required to prove, namely that § 13-35 13 addresses a compelling state interest. Given the State's burden, this complete failure of proof alone renders the statute unconstitutional.

The State can gain no assistance from *Crawford v. Lungren,* 96 F.3d 380 (9th Cir. 1996), *cert. denied,* 520 U.S. 1117 (1997), and merely the "common sense on which it repeatedly relies, State's Brief (State's Br.) at 10-1 1, in an attempt to avoid its heavy burden of actually demonstrating the constitutionality of § *13-3513.*[3] *Crawford* merely cited the general compelling interest the state has in the well-being of children, but never discussed how the statute at issue was related to that unremarkable proposition. *Crawford,* 96 F.3d at 386. This is not sufficient. "[T]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *Reno, 521* U.S. at *875.* The court's discussion in *Crawford* focused only on least restrictive means analysis, not compelling interest, and as shown below was misguided on that score as well. As the above discussion makes clear, *Crawford* has been rendered obsolete by the Supreme Court's subsequent decisions in both *Reno* and *Playboy.*[4] The State must demonstrate a

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[3] As Judge Posner recently noted in regard to a city's unconstitutional attempt to restrict minors' access to certain materials, "[c]ommon sense is sometimes another word for prejudice." *Am. Amusement Mach. v. Kendrick,* 244 F.3d 572, 579 (7thCir. 2001).

[4] The current state of the law is confirmed by Judge Posner s very recent opinion in *Am. Amusement Mach. v. Kendrick,* 244 F.3d *572, 576* (7th Cir. 2001), holding that a compelling interest must be

compelling interest behind the specific statute at issue and not merely recite a generic proposition. The State has not and cannot do this with § 13-3513. This Court need not look any further to declare the statute unconstitutional.

2. The State has not demonstrated that A.R.S. § 13-3513 is narrowly tailored using the least speech restrictive means.

The State has not shown that vending machines in Arizona are dispensing material "harmful to minors," nor that it has a compelling interest in trying to forestall such hypothetical distribution. The State offered no evidence on either of these required elements of its case. Even if it had, § 13-35 13 still would be unconstitutional because the State has not demostrated, and cannot so demonstrate as it must, that the statute is narrowly tailored as the least speech restrictive means to accomplish the alleged compelling interest.

The State's obligation here is clear. "If a less restrictive alternative would serve the government's purpose, the legislature must use that alternative." *Playboy,* 529 U.S. at 813. See also *Reno,* 521 U.S. at 874; *Sable Comm.,* 492 U.S. at 126 ("The Government may... regulate the content of constitutionally protected speech in order to promote a compelling interest ifit chooses the least restrictive means to further the 'articulated interest.") *Playboy* again is the latest, controlling authority and there the Court is even more explicit: "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of

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shown, and not be *merely plausible,* when the government regulates material that is protected by the First Amendment in the interest of protecting children.

expression prevails, *even where no less restrictive alternative exists." Playboy, 529* U.S. at 813 (emphasis added).

If a state wishes to keep materials that are sexually explicit (but not obscene) out of minors' hands it must do so in a way that does not substantially impair adults' access to the material. *See Ginsbergv. New York,* 390 U.S. 629, 634-35 (1968). Here, however, § 13-3513 substantially burdens the rights of a publisher in easily and economically distributing fully protected newspapers to willing adult readers who have every right to freely access them. The statute not only punishes a publisher based on the content of his paper and his chosen means of distribution, but it also significantly constrains the First Amendment rights of adult readers.[5] This is impermissible.

A publication such as THE BEAT depends for its survival on its ease of accessibility to adults through economically sensible means that preserve anonymity for adult buyers who desire it. Section 13-35 13 singles out and restricts the sale of newspapers through vending machines for no discernible, demonstrated reason, and thereby threatens these papers' viability. The purported defenses under the statute in terms of use of access cards or tokens are totally meaningless, impractical and entirely unworkable. *See* Even. Open. Br. at 18-19. Moreover, even if vending machines were converted to use tokens rather than coins, the statute is entirely silent on how these tokens would be made available to adults but not minors. Indeed, this criminal statute that must be strictly construed, *see State v. Western,* 812 P.2d 987, 988, 990 (Ariz. 1991), does

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[5] As the Court noted in *Reno,* the constitutional tradition presumes that government regulation of the content of speech is likely to interfere with the free exchange of ideas. *Reno, 521* U.S. at 885.

not require any limitation on the distribution of the tokens.[6] As far as the statute is concerned, newspaper vending machines simply could be retrofitted with another device that would accept coins and dispense tokens to then be used to actually access the paper! This would significantly burden the publisher and readers to accomplish exactly nothing and just demonstrates the irrationality of § 13-35 13.

Moreover, the State has available an entirely adequate alternative to fully and effectively serve any legitimate interest it may have regarding distribution of material "harmful to minors." A.R.S. § 13-3506 (§13-3506) prohibits the distribution *to minors,* through a wide variety

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[6] To the extent § 13-3513 is interpreted to require an *additional* measure that a "defendant has taken reasonable steps to ascertain that the person is eighteen years of age or older," *id.*, the statute is unconstitutionally vague. *See Reno,* 521 U.S. at 87 1-72 ("The vagueness of [a content-based] regulation raises special First Amendment concerns because of its obvious chilling effect on free speech"). "A statute is void for vagueness if it fails to 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement.'" *The Free Speech Coalition v. Reno,* 198 F.3d 1083, 1095 (9th Cir. 1999) (holding the Child Pornography Prevention Act of 1996 void for vagueness and quoting *Kolender v. Lawson,* 461 U.S. 352, 357 (1983)), *cert. granted sub nom. Ashcroft v. Free Speech Coalition,* U.S. , 121 S.Ct. 876 (2001). *See also Gravned v. City of Rockford,* 408 U.S. 104, 108-09 (1972). What could possibly be "reasonable steps" to ascertain the age of each individual using a vending machine, and how could a potential defendant possibly know what steps are adequate? *See State v. Western,* 812 P.2d 987 (Ariz. 1991) (holding ordinance regulating striptease performances unconstitutionally vague).

of means, of any item "harmful to minors."[7] This statute targets what the State apparently is concerned about, namely material that is harmful to minors *actually in* the hands of minors. The State, however, cannot avoid having to prove there is such a problem by an unwarranted, sweeping regulation of vending machines. Indeed, the total lack of any action against THE BEAT under § 13-3506 for over 33 years proves that there is no problem that § 13-3513 addresses. Thus, just as in *Playboy,* 529 U.S. at 816, 824-25, there is another existing statute, here § 13-3506, that is an effective, far less speech restrictive alternative to achieve any legitimate State interest in this area. "A court should not assume a plausible, less restrictive alternative would be ineffective." *Playboy,* 529 U.S. at 824. Rather, "[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy,* 529 U.S. at 816; *see also id.* at 823-24. The State here has not met its obligation and § 13-3513 is unconstitutional.

The State's reliance on *Crawford* again is entirely misplaced. *Crawford* is an anomaly that has been rendered obsolete by *Reno* and *Playboy.* Moreover, *Crawford* does not stand for the sweeping principle the State relies upon because the court there both acknowledged the importance of legislative findings and trial evidence and the need for the state to demonstrate the ineffectiveness of any imagined alternatives to the state's regulation. "We agree that if a plaintiff or the court can imagine and allude to other means, the state has the ultimate burden of showing that the means in question are not effective." *Crawford,* 96 F.3d at 386.

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[7] A.R.S.§ 13-3506 makes it unlawful to knowingly and recklessly "transmit, furnish, present, provide, make available, give, lend, show, advertise, offer or distribute to minors any item that is harmful to minors."

Again the State has not even attempted to meet its constitutional burden and § 13-3513 is unconstitutional.

3. A.R.S § 13-3513 also violates the Arizona Constitution.

Section 13-35 13 is unconstitutional on its face because it neither addresses any compelling interest nor is narrowly tailored using the least restrictive means. This is abundantly clear under the First Amendment and controlling federal precedent. It is even clearer under the free speech provision of the Arizona Constitution, Article II, §6,[8] because the Arizona Supreme Court has ruled that the protection for freedom of expression under the Arizona Constitution is even broader than that under the First Amendment. *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n,* 773 P.2d 455, 459-60 (Ariz. 1989). The above arguments thus apply, *a fortiori,* to render § 13-3513 unconstitutional under the State constitution as well.

II. EVENSON'S CONVICTION MUST BE REVERSED BECAUSE AS A MATTER OF LAW THE BEAT IS NOT "HARMFUL TO MINORS."

Minors have First Amendment rights that cannot be infringed. *Erznoznick v. City of Jacksonville,* 422 U.S. *205,* 212-14 (1975); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 506-07 (1969); *Ginsberg v. New York,* 390 U.S. 629, 637 (1968); *Am. Amusement Mach. v. Kendrick,* 244 F.3d 572, 576 (7th Cir.2001). *See also Reno,* 521 U.S. at 895 (O'Connor, J., Rehnquist, C.J., concurring in judgment in part and

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[8] Article II, Section 6, FREEDOM OF SPEECH AND PRESS, states:

"Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

dissenting in part). In particular, nudity is protected speech even with minors in the audience. *Erznoznick,* 422 U.S. at 213 (holding invalid city ordinance, aimed at protecting youths, that prohibited the showing of films containing nudity by a drive-in theater visible from a public street). THE BEAT is not obscene and therefore is protected by the First Amendment. *Reno,* 521 U.S. at 874, *quoting Sable,* 492 U.S. at 126. This Court has an obligation to make an independent review of the record. In doing so it is abundantly clear that, as a matter of law, THE BEAT is not harmful to minors and Evenson's conviction must be reversed and the criminal complaint dismissed.

A. The Court must make an independent review of the record.

This Court must "conduct[] an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 505 (1984) (overturning federal bench trial finding of actual malice in defamation suit). Appellate courts cannot simply turn over highly ambiguous and emotionally charged phrases such as "harmful to minors" to factfinders and then defer to such factfinders' conclusions on ultimate constitutional issues. Rather, independent judicial review is required to preclude prejudiced or erroneous deprivations of constitutional rights. *See Boy Scouts of America v. Dale,* 530 U.S. 640, 648-49 (2000) ("Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression.")

The *Bose* Court was unequivocal as to what is required. "Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Bose,* 466 U.S. at 505. Therefore, appellate judges "as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold." *Id.* at 511.[9] This task is especially easy here because there is *no* such evidence in the record.

C. As a matter of law THE BEAT is not "harmful to minors

To be within the purview of § 13-3513, material must be "harmful to minors" as defined in A.R.S. § 13-3501. To be within this definition, the State must show that "[t]o the average adult applying contemporary state standards with respect to what is suitable for minors," the material: (1) "[a]ppeals to the prurient interest, when taken

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[9] *Bose* was a defamation case, but the Court made quite clear that the requirement of independent appellate review applies generally to a conclusion that certain speech is unprotected. *See Bose,* 466 U.S. at 504-08; *see also Boy Scouts of America v. Dale,* 530 U.S. 640 (2000) (applying independent review to issue of freedom of association); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group,* 515 U.S. 557 (1995) (applying *Bose* to the question of whether certain conduct is expressive). Thus, lower courts have applied *Bose* to alleged obscenity, *see e.g., Luke Records, Inc. v. Navarro,* 960 F.2d 134, 138 (11th Cir. 1992), *cert. denied,* 506 U.S. 1022 (1992), and the Ninth Circuit has applied it in determining that a lawyer's speech did not interfere with the administration of justice. Standing *Comm. for the Central Dist. of Cal. v. Yagman,* 55 F.3d 1430, 1443 (9th Cir. 1995).

as a whole"; (2) is "patently offensive"; *and* (3) "[t]aken as a whole does not have serious literary, artistic, political, or scientific value for minors." A.R.S. § 13-3501. The State has not and cannot show *any* of these necessary elements.

First, the vending machine statute applies to all minors up to age eighteen. It irrationally treats equally a five year old child who is extremely unlikely even to operate a coin operated vending machine, a twelve year old who likely has no interest whatsoever in a tabloid newspaper such as THE BEAT addressed to single and divorced adults, and a seventeen year old who may have several legitimate interests in THE BEAT. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 74 (1976). There is good reason for this, especially with regard to children's First Amendment rights and interests. Children must be prepared to function in the world as the adults they soon will become, and this cannot happen overnight." To shield children right up to the age of 18 from exposure to . . . [arguably inappropriate material] would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it." *Am. Amusement Mach. v. Kendrick,* 244 F.3d 572, 577 (7th Cir. 2001) (Posner, J.). *See also Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925).

Thus, to its credit, the State has conceded, as it must, that THE BEAT cannot be measured under § 13-3513 by the standard of a five year old. Rather, "[i]f THE BEAT has... serious value.. . for a 17-year-old, then it is not harmful to minors." State's Br. at 22.[10] *See also Pope v. Illinois,* 481 U.S. 497, 500-01 (1987). Moreover, as is

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[10] The jury, however, likely was allowed improperly to consider the effect on very small children. *See* Even. Open. Br. at *50.*

implicit in the State's admission and is required under the statute, THE BEAT must be considered as a whole; the Court cannot focus just on the pictures of topless models.

The issue of THE BEAT in contention here, Vol. 33, No. 29, is described in Even. Open. Br. at 4-6. The State apparently does not dispute that the only sexually explicit material in the newspaper's words or pictures are the interior, grainy, black and white photos of topless models comprising a distinct minority of the content. Two front page articles, on the other hand, discuss gender differences in toleration of alcohol and excuse-making as a healthy mechanism to cope with some stresses of life. An editorial on page four warns of the dangers of relying on credit cards. In the unlikely event that a seventeen year old should pick up the newspaper, these articles clearly are of serious value to him or her. On the other hand, in today's society and culture, just what is the adverse, indeed "harmful," effect on such a teenager of some grainy, black and white newspaper pictures of topless women? Incredibly, the State has not even attempted to answer this question.[11]

At trial in *Playboy,* the government offered at least some minimal, expert, psychological evidence of the harm to children alleged to flow from signal bleed. The district court properly required "some evidence of harm...[t]he mere articulation of a theoretical harm is not enough." *Playboy Entertainment Group, Inc. v. United States,* 30 F.Supp.2d 702, 716 (1998). The court clearly was troubled

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[11] The State has not even indicated whether the harmful effects it alleges apply to both male and female viewers. This uncertainty derives from the State's failure to show that *any* minors have ever accessed THE BEAT.

by the "paucity" of evidence before it. *id.*[12] This Court should be all the more troubled, to the point of reversing Evenson's conviction and dismissing the complaint, by the *total* lack of evidence here.

Other than the one complainant (a 67 year old adult male), the only witnesses produced by the State were three police officers. Police officers have no expertise as to what expression is harmful to minors, and no one alleged THE BEAT is harmful. Indeed, each officer had no knowledge of minors ever accessing THE BEAT or of any prior complaints about THE BEAT throughout its 33 year history. Apparently no one testified that, taken as a whole, THE BEAT appeals to anyone's prurient interest, or that it is patently offensive, or that it lacks value for minors. The State entirely defaulted on its constitutional obligation to prove its case.

There is good reason for the State's utter default. Under the contemporary state standards with respect to what is suitable for minors that the statute and constitutional law demand be applied, THE BEAT taken as a whole does not appeal to prurient interests nor is it patently offensive. Indeed, THE BEAT hardly differs in sexual content from a wide variety of media that minors, certainly 17 year olds, are inundated with daily, for better or worse. Much of current television programming is

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[12] The unavailability of evidence of harm to minors from sexually explicit materials is not surprising. As the Chief Judge of the Court of Appeals for the District of Columbia Circuit noted regarding indecent television programming, "There simply is no evidence that indecent broadcasts harm children." *Action for Children's Television* v. FCC, 58 F.3d 654, 682 (D.C. Cir. 1995) (Edwards, C.J., dissenting), *cert. denied*, 516 U.S. 1043 (1996). *See also Am. Amusement Mach. v. Kendrick*, 244 F.3d572, 5 78-79 (7th Cir. 2001) (Posner, J.) (finding the social science evidence of harm to children inadequate).

replete with rather explicit sexuality. Topless female nudity is readily available on cable and satellite television, subscribed to by over 80 percent of American television households.13 The Sopranos on HBO is only one, highly popular example of such programming that readily comes to mind. THE BEAT is hardly different in sexual quality from either the famous "Swimsuit Issue" of SPORTS ILLUSTRATED or the equally sought after catalogue from VICTORIA'S SECRET, both of which are avidly read by, if not targeted to, teenagers. Indeed, what is barely concealed in such "mainstream" publications may be much more enticing and alluring to the imagination than what is more plainly shown elsewhere. Many teen-oriented magazines - for example, SEVENTEEN, COSMOPOLITAN and the like - contain far more explicit depictions of sexual matters than THE BEAT. And we have not yet mentioned the Hollywood movie output. The blockbuster movie TITANIC is rated PG- 13[14] and probably has been seen (more than once) by virtually every teenager in Arizona. Yet it includes topless female nudity, and this is one of the mildest such examples that could be adduced. In this cultural milieu, THE BEAT cannot possibly be considered "harmful to minors."

C. The State compounded its total lack of evidence of harm to minors by improper arguments to the jury.

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13 *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report, ¶¶ 18, 19, 61, CS Docket No. 00-132, FCC 01-1 (Jan. 8, 2001).

14 The PG-13 rating by the Motion Picture Association of America states: *PARENTS STRONGLY CAUTIONED Some material may be inappropriate for children under 13.* TITANIC was so rated "for disaster related peril and violence, nudity, sensuality and brief language." *See* <www.titanicmovie.com>.

The State tried to make up for its understandable, total lack of competent evidence to prove any of the required elements of the offense by improperly swaying the jury in at least two ways. First, after the initial deadlocked jury, the prosecutor must have realized he couldn't convict based on THE BEAT itself, so he resorted to an *in terrorem* argument to the jury. That is, rather than confine the jury's attention to THE BEAT and the case before it, the only proper subject of consideration, the prosecutor implored the jury to convict because of the effect he claimed an acquittal would have on "other publications.., *worse stuff."* Even. Open Br. at 59. This tactic amounts to an admission by the prosecutor that THE BEAT itself is not harmful to minors and is not properly proscribable under § 13 -3513. Even more, such an argument is plain error requiring reversal. *See* Even. Open. Br. at 59-60.
The other improper influence on the jury was the State's novel, requested instruction, wrongly accepted by the trial court, that "[mlerely because something is available in the community does not mean that it is acceptable in the community." Even. Open. Br. at 61. Under § 13-3501, the determination of whether something is "harmful to minors" requires the factfinder to apply "contemporary state standards." A.R.S. § 13-3501. It may be that just because one instance of the same or similar material to the publication in question can be found somewhere in the state does not take the publication out of the reach of the statute. But this is not what the given instruction states. Rather, the clear and erroneous impression the instruction conveyed to the jury was that it should not do what the statute requires, namely judge THE BEAT in comparison to the whole range of rather explicit, sexually oriented material readily available throughout the state.

At a minimum, the risk is far too great that the jury was dissuaded by the instruction from applying the applicable law as to contemporary state standards for the

conviction to stand. As discussed above, had the jury properly been allowed to consider THE BEAT within the full milieu of the plethora of sexually suggestive and explicit material readily available today to teenagers in a wide variety of media, the jury could not have found THE BEAT harmful to minors.

A recent example makes this point forcefully clear. A video store owner in Provo, Utah, was charged with selling obscene materials. Just prior to trial, the defendant's lawyer, a public defender, sent an investigator to the Marriott Hotel across the Street from the lawyer's office to record the sex films a hotel guest could obtain through the hotel's pay-per-view channels. He also obtained records on how much erotic fare people in the local county were buying from cable and satellite television operators. He discovered that people in Utah County were disproportionately large consumers of the very videos the prosecutor was claiming were obscene and illegal! The newspaper report of this incident notes "[i]t took only a few minutes for the jury to find [the defendant] not guilty on all charges."[15] The prosecutor here wanted to avoid exactly this natural result, and this is what the erroneous instruction improperly achieved.

Evenson did not have the obligation of proving that THE BEAT is not harmful to minors; rather, the State had the obligation of proving each and every element of the definition. The State offered no evidence on this and so failed totally on its obligation. The prosecutor then tried to fill the gap by precluding the jury from following the constitutionally mandated intent of the statute. The jury had an obligation to judge THE BEAT not according to their own personal standards, but according to contemporary

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[15] Timothy Egan, Technology Sent Wall Street Into Market for Pornography, N.Y. TIMES, Oct. 23, 2000, at 1.

state standards, regardless of whether they agreed with those standards. Unfortunately the trial court's erroneous instruction allowed the jury to evade this obligation. This error alone requires reversal of Evenson's conviction.

CONCLUSION

For the foregoing reasons, the Court should apply strict scrutiny and declare A.R.S. § 13-3513 unconstitutional under the Federal and Arizona Constitutions. In the alternative, the Court should reverse the conviction below and dismiss the criminal complaint.

RESPECTFULLY SUBMITTED this ____ day of May, 2001.

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Criminal Procedure 31, I certify that the attached brief

X Uses a proportionately spaced type of 14 points or more, is double-spaced using a roman font, and contains 6030 words; or

__ Uses monospaced type of no more than 10.5 characters per inch, and

__ does not exceed 35 pages (amicus brief); or

__ contains _____words.

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Two (2) copies of the foregoing Amicus Brief were mailed this 16th day of May, 2001, to:

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COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, vs. JEROME EVENSON, Appellant.	NO. _____ Court of Appeals No. 1 CA CR 00-0621 Department B Maricopa County Superior Court Cause No. CR 97-09901

PETITION FOR REVIEW

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PETITION FOR REVIEW

The Appellant Jerome Evenson petitions this Court to review, and ultimately reverse, two legal opinions of the Court of Appeals, Division 1, (one published, one non-published) which upheld a recently enacted "content-based" statute criminalizing the sale of newspaper when offered through a coin operated vending machine. This case is one of first impression regarding A.R.S. §13-3513 and addresses major First, Fourth, Eighth and Fourteenth Amendment Constitutional issues as well as vital Arizona Constitutional issues. The Appellant denied "compelling government interest" and refuses to waive his constitutional rights. **IA-31, 137, 192**. This petition for review is submitted pursuant to Rules 31.12 and 31.19 of the Arizona Rules of Criminal Procedure.

After two jury trials, a second jury found the content of Appellant's paper to be "harmful to minors." The Court of Appeals upheld the constitutionality of the criminal statute even though there was no legislative history showing that this newspaper, or comparative newspapers offered or sold from news racks, were ending up in the hands of minors or harming them in any way. Additionally, there was no trial testimony offered by any police officer or lay witness that any minor had ever purchased, viewed or been exposed to, or harmed by, this weekly newspaper in its 33 year history.

The issues raised in this petition challenge the constitutionality of a four-year old statute enacted without any legislative hearings or findings that newspapers offered in newsracks were harming minors. The Court of Appeals decision eviscerates petitioner's First, Fourth, Eighth and Fourteenth Amendment rights, and misinterprets clear directives from the United States Supreme Court regarding

content-based First Amendment penal statutes.

I. BACKGROUND FACTS

During the 1997 legislative session, the Arizona State Legislature enacted A.R.S. §13-3513 into law. The new statute, which makes it unlawful for any person to knowingly display, sell or offer to sell in any coin-operated vending machine any "material harmful to minors, as defined in A.R.S. §13-3501," became effective July 27, 1997. The Legislature did not engage in any type of "fact-finding" inquiry before implementing A.R.S. §13-3513 in 1997 **(p. 11, lines 17-18 of Appellee's Answering Brief).** The law was passed as a "strike everything amendment" to an unrelated bill originally to deal with "illegal alien" problems. Accordingly, there were no public or legislative committee hearings which identified any compelling governmental purpose or harm requiring the new legislation. **(Court of Appeals, page 5 footnote).**

On August 27, 1997, four weeks after the new law took effect, search warrants were served on 15 of Appellant's news racks. The racks, newspapers, and coins were seized by police officials. At the time of the search, the Maricopa County Attorney orchestrated a media event at the first location of the police seizure, requiring detectives to carry out the seizure wearing "ski masks" to conceal their identity. **TR-5/11/00@134:15-23; TR_5/15/00@69;25-71:16; 107:22-108:7; 109;8-12.**

On September 4, 1997, only seven days after the seizure, Appellant Jerome Evenson, publisher of *The Beat* newspaper (weekly) in Arizona and other states since 1964, became the first and only newspaper publisher ever charged under this new statute. He was indicted on 15 felony counts

under the statute **1A-1.**

In the first trial, the jury announced that they could not agree on "contemporary state standards." The trial judge refused to clarify the "standards" of the law. Hopelessly deadlocked, with nine of the twelve jurors favoring acquittal, a mistrial was declared. **IA-132, 150, 151, 183, 185.** In the second trial, Appellant was convicted on 13 of the 15 counts[1] **IA-237** and was sentenced to thirteen designated class 6 felonies[2], fined $166,400 ($8000 per count plus a 60% surcharge) and placed on three years felony probation with a proviso that probation would be continued another three years if the fine was not paid. **IA-258, 263,264; TR 8/23/2000@39:12-40:8.**

The 15 charges arose out of a police requested purchase of a single newspaper dated August 22-28, 1997, identified as Volume 33, No. 29. **IA-11** The only complaint was made by a 63-year old male, with no minor children, who first reported he had been "given a copy" at a meeting and then testified that he "found" a copy on a news rack. The complainant stated the investigating officer told him to "purchase" a new copy of *The Beat*. **TR5/11/2000@8:23-25.**

At the time of the criminal indictments, *The Beat* newspaper contained the news, photos and features of World News Syndicate (WNS) **IA-11**. *The Beat* has historically featured news stories and editorial opinions of public interest. **TR-5/15/00 @ 101:14-17 and 164:21-23.** To financially support the newspaper and Appellant's often controversial

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[1]Two of newspaper racks did not have papers in them.

[2]The trial judge could have left the convictions undesignated, imposing misdemeanor convictions at the conclusion of the sentence.

opinions, the newspaper printed advertisements from many adult oriented business such as night clubs, licensed escort services, models, masseuses, entertainers, social clubs and adult bookstores. Readers also advertised seeking to meet other adults with similar interests in the classified "personal" section of the newspaper. Many of these advertisers placed similar advertisements in the New Times, Arizona Republic, The Rep, Mesa Tribune and other general circulation newspapers **IA-11** which are also sold or given away from street corner news racks.

While female breasts are exposed by models and entertainers in a minority of advertisements in the August 22-28, 1997 issue, neither male or female genitalia or pubic hair are displayed in the newspaper.[3] There are NO four letter words and NO sexually explicit or obscene language in the newspaper. **IA-11**. There has never been full frontal nudity or sexual activities depicted in the newspaper.

Phoenix Detective White, the lead investigator, stated he felt there was nothing in the newspaper which was directed towards minors, and that the defendant Evenson was making no attempt to get his newspaper into the hands of minors. **TR-5/15 @ 107:10-12.** In all of his years of working the vice detail, Detective White had never received or heard of a complaint about a minor obtaining or having possession of The Beat. White admitted that he had no knowledge of any investigative leads involving one child who was ever harmed by the Beat during the 33 years of its publication. **TR-5/15/00@127:1-5.**

Detective White testified that the defendant was not

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[3]In this issue there was a news photo of a nude, deformed baby resulting from the Chernobyl nuclear plant accident.

attempting to distribute his newspaper to minors. **TR-5/15/00@112:22-25;131;5-9**. Detective White told the jury that A.R.S. §13-3513 is so ambiguous and vague that "we don't know this is obscene." He left the decision of what was "harmful to minors" up to the public, not police or prosecutors. **TR-5/15/00@ 116:15-25;117:5-10.** The trial judge, in chambers, stated to both counsel:

> I agree with your description earlier about trying to catch smoke in a net, a lot of that seems to be the case here. To me we're sort of throwing it in their lap and saying, Okay, tell us what the crime is, and to me I have never been in that position before. **TR5/16/2001 @15:22-16:2**

There is no evidence, anywhere, that any minor has ever seen, **purchased** or even showed an interest in a Beat newspaper in its 33 years of existence. **TR5/11/00@13:18-22; TR-5/15/00@3:17-23;TR-5/11/00@47:10-13;TR-8/23/00@39:15-20.** The Deputy prosecutor, in the presence of the jury panel, conceded that the State knew of no child who had ever purchased or seen the paper. **TR-5/15/00@120:20-121:12.** The trial judge, at sentencing, expressly found that there was ". . . no complaint of any parent saying any kid got hold of this . . ." **TR-8/3/00@39:17-18**. Complaining witness Nelson **TR-5/11/00 @ 13:1 3-17;17:16-19,** Detective White, **TR-5/15/00@127:1-5**; Sergeant Thatcher **TR-5/15/00@33;12-23** and Detective Lythgoe **TR-5/15/00@161:6-10** and the State prosecutor **(p.11, Answering Brief)** all agreed that they had never received complaints about the newspaper impacting minors in any way.

II. REASONS THE SUPREME COURT SHOULD GRANT REVIEW

The issues raised in this petition challenge the constitutionality of a four-year old statute directed at the press and enacted without any legislative hearings or findings that a problem actually existed with minors accessing the paper. Except for this Division One Court Ruling, no Arizona court has interpreted this statute.

The Court of Appeals decision eviscerates Appellant's, and others', fundamental First, Fourth, Eighth and Fourteenth Amendment rights, and misinterprets clear directives from the United States Supreme Court regarding content-based First Amendment penal statutes. It similarly ignores rights guaranteed by the Arizona Constitution. Contrary to the U.S. Supreme Court's decision in *Playboy*, the Court of Appeals upheld the constitutionality of the criminal statute even though there was no legislative history showing that this newspaper, or comparative newspapers, offered from news racks, were ending up in the hands of minors, or otherwise harming them in any way. Indeed, neither the Arizona Legislature, when they enacted A.R.S. §13-3513, nor the Superior Court, where Appellant was tried and convicted, received one scintilla of testimony or evidence that a problem exists with youths viewing or accessing these news racks.

III. ISSUES PRESENTED FOR REVIEW

A. When the Arizona Legislature enacted A.R.S..§13-3513 as a criminal statute targeting content-based publications, did the U.S. Constitution and/or the Arizona Constitution require the Legislature to conduct hearings and receive substantial and compelling evidence that such publications, being distributed through news racks, were

actually causing real and substantial harm to minors?

B. Can a publisher who offers a newspaper through vending machines subsequently be charged and convicted of a crime where there is no evidence or findings that any minor, in 33 years of similar publications, has ever viewed, purchased or been exposed to the publisher's newspaper?

C. Does A.R.S.§13-3513 violate the equal protection clause of the U.S. and Arizona Constitutions by arbitrarily and unfairly targeting newspaper publishers who offer their product from unrestricted coin operated vending machines?

D. Does A.R.S.§13-3513 violate the due process clause of the U.S. and Arizona Constitutions by criminalizing actions that are unconstitutionally vague and void of identifiable, clearly defined "contemporary state standards"?

E. Does a fine of $166,400 levied against a publisher for offering a newspaper through coin operated news racks violate the Eighth Amendment prohibition against excessive fines and the first amendment rights of speech and press?

F. When the Legislature initially excluded newspapers when defining "material harmful to minors" under A.R.S. §13-3501, and continued to exclude newspapers despite numerous amendments, did the court violate petitioner's substantive due process rights by judicially expanding the statute to include "newspapers?"

IV. LEGAL DISCUSSION

Both the appellate court and the State acknowledge that A.R.S. §13-3513 is a "content based" statute directed at a newspaper offered for sale in coin operated vending machines. In *Greater New Orleans Broadcasting Assn. Inc. v. United States*, 527 U.S. 173,183 (1999), the United States Supreme Court held that the First Amendment mandates close scrutiny when government imposes restrictions on speech. The State bears a clear and heavy burden to justify any restrictions imposed against speech. *Tinker v. Des Moines Independent Community School Dist.*, 393U.S.,503,509(1969); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (May 22, 2000). The burden is not satisfied by mere speculation or conjecture, rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree. (Emp. add) (Citing *Edenfield v. Fane*, 507 U.S. 761, 771(1993). *See also, Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480(1989).

The Arizona Court of Appeals conceded that there was virtually no legislative history on this legislation, and that the law was passed as a "strike everything amendment" to an unrelated (illegal alien) bill **(ApCt. Pg5-ftnote3)**. The Appellate court acknowledged that the record was not entirely clear as to what precipitated this legislation **p.5, §7.** The Arizona Legislature, before enacting this content-based legislation, heard no testimony from police, prosecutors, or the public showing that news racks carrying adult-oriented newspapers were ending up in the hands of minors or otherwise attracting the attention of minors. There was no evidence or findings that the alleged harms cited in the statute

were real. This absence of any legislative fact-finding justifying a genuine and compelling need for this statute is fatal.

The *Playboy* decision from the U.S. Supreme Court sets forth a two-step process for evaluating "content-based" statutes:

1. When government enacts and later seeks to enforce a penal statute affecting speech, it is required to establish the actual existence of the harm targeted by the statute with relevant judicial and legislative findings; and

2. Once a harm is clearly and quantitatively established, the Government must further show that the statute imposes the "least restrictive" method to protect against that specifically defined, identifiable, actual harm.

Playboy, like petitioner, challenged a new law, and the validity of the legislation was submitted to a three-judge federal panel. Evidentiary hearings were held on the *existence* and *extent* of Playboy's cable exposure to minors. The Supreme Court, in this landmark case, mandated that before Congress could curtail Playboy's right to send its signal, the government had to prove that "signal bleed" was actually being seen by significant numbers of children and had become a pervasive problem to minors.

> The District Court began with the problem of signal bleed itself, concluding "the Government has not convinced us that [signal bleed] is a pervasive problem." *Id.*, at 708-709, 718. The District Court's thorough discussion exposes a central weakness in the Government's proof: There is little hard

> evidence of how widespread or how serious the problem of signal bleed is. 120 S.Ct. at 1889 (Emp. added)

The Evenson trial record is void of any hard evidence that news racks were creating a "pervasive problem" for minors.

The Supreme Court mandated that government authorities had to prove and establish the quantitative effect of the problem in actual documented cases before Playboy's right to carry its signal could be impeded.

> To say that millions of children are subject to the risk of signal bleed is one thing; to avoid articulating the true nature and extent of the risk is quite another ... The question is whether an actual problem has been proven in this case. We agree that the Government has failed to establish a pervasive, nationwide problem, justifying its nationwide daytime speech ban. 120 S.Ct. at 1889 (Emp. added)

The government's attempt to infer harm through hypothetical numbers in *Playboy* was expressly rejected. The questions posed in *Playboy* scream out in this case. Where is the evidence of a real problem or real harm to minors as a result of offering a newspaper through news racks? The Legislature and the prosecution have failed to provide a single instance where any minor, even one minor, has ever been exposed to *The Beat* newspaper. There is no evidence, anywhere, that there was any problem with children accessing Appellant's news racks, or any similar news racks. The legislature designed a mischief in enacting A.R.S. §13-3513, and then chilled free speech by creating a vague, hypothetical evil that does not appear to exist. There are means less

burdensome to the First Amendment available to the State in A.R.S. §13-3506 to curtail an allegedly "offending" publication.

A.R.S. §13-3513 also violates the due process and equal protection clauses of the Constitution. Appellant believes, as a matter of law, that the newspaper content has never harmed minors. By failing to develop facts that minors were actually accessing the contents of news racks, the statute violated equal protection standards by arbitrarily singling out those who need news racks to make the newspaper readily available to their intended readers and to sell their newspapers as a method of defraying costs, while ignoring far more damaging materials reflecting the real "contemporary state standards," openly marketed by other means within the public domain or readily accessible in public libraries.

The Appellate Court, in commenting on the statute's suggested defenses, stated that "modifying the vending machine to accept tokens does not appear to be impractical." **AC pg 19-20** In fact, no such device exists. Contrary to the hearsay testimony of a police officer that machines could be modified to accept only tokens for about $90, any tokens used in any mechanisms available would only work with tokens the exact size of U.S. coins and therefor be ineffective as a control. There is no "safe harbor."

Due to the vagueness of A.R.S. §13-3513, and given the whims of the prosecution, innocent citizens like press people, delivery personnel, and others involved in the distribution of the paper can easily be included within the offending targeted class.

The statute is hopelessly vague. Neither police, prosecutors, lawyers or judges, as evidenced by the record,

could give the Appellant, or anyone, the slightest clue of what constituted "materials harmful to minors" or existing "contemporary state standards," yet Appellant was marked with 13 felonies and staggering fines based on an admittedly vague statute. Now, placed on probation, the Appellant's Rights under the First Amendment are severely impeded in that even an unpopular political statement or editorial aimed at the County Attorney could result in new newsrack seizures, actions being filed to revoke petitioner's probation and to send him to prison.

As to the fine, simple arithmetic in this case of first impression illustrates the excessive nature of the fine, which violates Appellant's First and Eighth Amendment rights. This Court has ruled that criminal fines are subject to Eighth Amendment analysis: *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 2913-14, 106L. Ed. 2d 219 (1989). *A fine is excessive if it "exceeds reasonable, usual, proper, or just punishment." State v. Wise,* 164 Ariz. 574, 576, 795P.2d 217, 219 (App. 1990). The method used by the trial judge in this case in assessing the fine demonstrates how a prosecutor can drive an unpopular publisher out of business and silence the voice of his nemesis. The trial judge based the fine upon the conviction for each count, stacking each fine with each count. The County Attorney had seized 15 of 200 racks. One of the lead police witnesses explained why they did not seize all the news racks:

> We just found five machines that were somewhat spread throughout the City of Mesa. We chose to not get all 17 machines just because of the issue of storage and they take up a lot of space." **TR5/15/2000 @145:17-20**

Using the trial judge's line of reasoning for determining the amount of the fine, the fine could have been in excess of $3 million had the police seized, and had Appellant been charged, with a violation on each of his 200 news racks. This could have easily been accomplished by seizing newspapers from each of the remaining 185 racks, photographing their seizure and supporting the seizure through police testimony. This method of calculation puts a chilling effect on all newspaper publishers who distribute their product through coin operated newspaper racks in an effort to defray costs of printing and distributing their viewpoints. Only wealthy publishers could exercise First Amendment Rights with such a chilling threat from the courts.

The Appeals Court virtually ignores the rationale supporting fines set forth in *State v. Day,* 148 Ariz.490,715P.2d743(1986). That case held that

> ... in determining whether a punishment is so disproportionate to the offense as to be cruel and unusual, consideration is to be given to the degree or danger which the offense and the offender present to society, to punishments prescribed in the same jurisdiction for more serious offenses, and to punishments prescribed for the same offense in other jurisdictions.

Since no minor, according to the evidence and testimony, has ever seen *The BEAT* in 33 years, and since the publisher has distributed almost identical newspapers for 33 years without complaint from any source, the fine is not only factually absurd but constitutionally excessive.

There were a multitude of other issues presented to the Court of Appeals which Appellant incorporates within this petition for review and which were decided adverse to his position. For example, the Appellant's case was delayed for 2 1/2 years, in large part due to an unnecessary special action taken by the prosecution. When the Appellant moved, pro per, to reinstate all 15 counts so he could expedite going to trial, the judge refused and allowed the prosecutor to file a special action to accomplish the same end, delaying the trial by another 12 months. **AI: 99, 101.** Appellant was faced with a "Hobson's Choice" – go to trial on one count and possibly face the expense and risk of another trial later, or wait another year for the Prosecutor's special action to be decided. Appellant maintains that his rights to a speedy trial were violated under ARCP Rule 8.2(a).

Appellant vigorously challenged and proposed a variety of jury instructions given or refused by the trial judge. Appellant believed that the jury instructions constituted misstatements of existing law, allowing each juror to find something they did not approve of in the newspaper and voting "guilty." The instructions negated any possibility that the jury's findings would give any reasonable person a clear indication of what "contemporary state standards" are, or were at the time, and unfairly prevented him from obtaining a fair trial.

The Court of Appeals concluded, without substantiation, that although "newspapers" are not listed in the extensive list of "materials harmful to minors" itemized so specifically in A.R.S. §13-3501, "that it appears the legislature intended" for magazines and newspapers to be treated the same. **ApCt Pg 5 ftnt 1.** A simple review of the legislative history exposes the fallacy of this reasoning. A.R.S. §13-3501, the defining section, was enacted in 1964.

Amendments were implemented in 1970 and 1974. The section was renumbered in 1977, then amended in 1978 and 1986. The legislature has amended the list of materials in A.R.S. §13-3501 multiple times over the years, yet never chose to add "newspapers" to the list of "materials harmful to minors."

CONCLUSION

Based upon the foregoing, Appellant respectfully urges this Court to accept review and invalidate A.R.S. §13-3513 and reverse the convictions of the Appellant for the reasons set forth in this petition.

RESPECTFULLY SUBMITTED this 23rd day of November, 2001.

JONES, SKELTON & HOCHULI

By_____
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CERTIFICATE OF SERVICE

A. Melvin McDonald, being first duly sworn, upon oath states that on the ___ day of November, 2001, he caused the original and six copies of the foregoing petition to be filed with:

Clerk, Arizona Court of Appeals
Division One
1501 West Washington
Phoenix, Arizona 85007

and that he caused two copies of the foregoing petition to be deposited in the United States Mail, postage prepaid to:

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_____
A. Melvin McDonald

SUBSCRIBED AND SWORN to before me this 23rd day of November, 2001.

_____
Notary Public

My Commission Expires:_____

A-235

IN THE SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA,

Plaintiff/Appellee,

vs.

JEROME EVENSON,

Defendant/Appellant/Petitioner

NO. CR-01-0438-PR
ARIZONA SUPREME COURT

Court of Appeals
No. 1 CA CR 00-0621
Department B

Maricopa County Superior Court
Cause No. CR 97-09901

PETITIONER/APPELLANT'S SUPPLEMENTAL BRIEF

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THE UNITED STATES SUPREME COURT HAS RECENTLY ADDRESSED THE CHILLING EFFECT THAT PENAL STATUTES AND DRACONIAN SENTENCES CREATE UPON THE FIRST AMENDMENT RIGHTS OF CITIZENS. THIS CASE ILLUSTRATES THE HARM CAUSED BY ILLOGICAL AND SWEEPING CONTENT-BASED STATUTES....1

II.

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On April 25 2002, this court granted the Petitioner/Appellant's (hereafter "Evenson") Petition for Review, and informed the parties that each side could file a supplemental brief within thirty (30) days of the order. Additional decisions of Constitutional magnitude have been decided by the United States Supreme Court since the filing of the original briefs before the Court of Appeals and Evenson's Petition for Review with this court. This supplemental brief is intended to address these new decisions, which further support Evenson's claim that the statute under consideration by this court violates both the Arizona and United States Constitutions.

I. THE UNITED STATES SUPREME COURT HAS RECENTLY ADDRESSED THE CHILLING EFFECT THAT PENAL STATUTES AND DRACONIAN SENTENCES CREATE UPON THE FIRST AMENDMENT RIGHTS OF CITIZENS. THIS CASE ILLUSTRATES THE HARM CAUSED BY ILLOGICAL AND SWEEPING CONTENT-BASED STATUTES.

The defendant Evenson has maintained, from the date of his indictment, that the use of the criminal law to suppress content based speech under the guise of protecting imaginary harm to minors violates the Free Press, Free Speech, Due Process and Excessive Fines provisions of the U.S. and Arizona Constitutions. Justice Kennedy, speaking for the majority in *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878 (2000), stated "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. Content-based regulations are presumptively invalid," *R. A. V v. St. Paul,* 505 U. S. 377, 382 (1992), and the Government bears the burden to rebut that presumption. *It is rare that a*

regulation restricting speech because of its content will ever be permissible." (Emp. added)

In the recent case of *Ashcroft v. Free Speech Coalition,* 535 U.S. _____ (2002) decided April 16, 2002, Justice Kennedy, again speaking for the majority, addressed the chilling aspect of potent criminal charges on the protected rights of speech and press. In 1996, Congress had enacted the Child Pornography Protection Act (hereafter "CPPA"). CPPA had criminalized the use of computer generated images that appeared as child pornography. The Court noted that CPPA imposed severe penalties to all who fell within its sweeping scope. The court addressed the serious implications created by the use of criminal statutes designed to chill the rights of free speech.

> The First Amendment commands, "Congress shall make no law . . .abridging the freedom of speech." The government may violate this mandate in many ways, e.g., *Rosenbergcr v. Rector and Visitors of Univ. of Va., 515* U.S.8 19 (1995); *Keller* v. *State Bar of Cal.,* 496 U.S. 1 (1990), *but a law imposing criminal penalties on protected speech is a stark example of speech suppression.* The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. §2252A(b)(1). A repeat offender faces a prison sentence of not less than *5* years and not more than 30 years in prison. *Ibid.* While even minor punishments can chill protected speech, see *Wooley* v. *Maynard,* 430 U.S.705 (1977), this case provides a textbook example of why we permit facial challenges to statutes that burden

> expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distribution images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression. See *Broadrick* v. *Oklahoma,* 413 U.S.601, 612 (1973). (Emp. added)

This case, like *Ashcroft,* serves as a poster child for chilling free expression with the hammer of the criminal law. After refusing to accept the findings of the first jury, which could not agree on or define contemporary community standards and voted 9-3 to acquit, the Defendant was convicted by a second jury of thirteen "class 6" designated felonies, a felony for each news rack. The potential punishment under consecutive sentencing could potentially have resulted in a prison sentences totaling 19.5 years. The court did impose consecutive fines based upon the seizure of the 13 racks, totaling $166,400 with surcharges. This chilling statute has given all prosecuting attorneys, under the guise of "harmful to minors," the raw power to threaten and silence "content based" publications sold from newspaper racks without any legislative or judicial record that any minor, in over three decades, has accessed newspaper racks to view these newspapers.

A simple analysis of this statute yields chilling implications: A statute enacted without any showing of the existence of a "real harm" to minors is being used to

silence the voice of a newspaper critic. It is important to remember that investigative techniques such as police surveillance, or the use of remote surveillance camera's to monitor activity (or inactivity) of minors at various news racks, were never implemented as part of any legislative inquiry or as part of the criminal investigation and prosecution. There were no legislative studies or even simple incident reports to confirm the existence of any problem of minors accessing defendant's news racks. From this barren legislative and judicial record, the Arizona legislature emasculated the United States and Arizona Constitutions by using the penal laws to attack and nearly destroy free speech and free press under the guise of "harmful to minors."

The resulting convictions following a *second* trial expose the chilling consequences of this new two-edged sword of A.R.S. § 13-3513. The first sword is yielded pre-indictment. On any given week, with no evidence that any minors are accessing a coin-operated news rack, the County Attorney can move against any publisher under A.R.S. § 13-3513, claiming a particular issue is harmful to minors. If he succeeds in getting a conviction after multiple attempts, as in this case, the second "first amendment" sword becomes an even deadlier weapon against speech. Since Petitioner's conviction, the Maricopa County Attorney, the Maricopa County Adult Probation Department and the Maricopa County Superior Court have literally emerged as the silent but ever present "editorial board" of The Beat newspaper. Evenson, with the permission of the court, has continued to travel to his home and base in Las Vegas where lie compiles the World News Syndicate features which are used in the Phoenix newspaper, but since this conviction dares not write controversial editorials or critique government officials. He is forced to prepare his constitutionally protected news, commentary, photos and art work in compliance with the vague Arizona description

of what may be "harmful to minors" in the eyes of these state officials. As a result, lie is forced to virtually ignore his intended audience of single and divorced adults who live in Arizona and other states -- all for fear that the County Attorney, probation officer or court may seek to arrest him and revoke his probation for violating the same vague statute -- selling newspapers through a news rack that they deem might be "harmful to minors." *See Art. 2, Sect. 22 (2) of Arizona State Constitution, A.R.S. §13-3968; See also Rule 7.5 and Rule 27.5, Arizona Rules of Criminal Procedure.* The standard to revoke Evenson's probation, and shut down his newspaper, unlike the original criminal conviction, is a mere "preponderance" of the evidence. *Sec Rule 27. 7(b)(7)* There will be no jury trial at a revocation hearing. *See Rule 27. 7(b,)(4)* This same County Attorney who orchestrated a media event with officers wearing ski masks as they seized defendant's news rack, can now view each issue sold from news racks every week and decide whether to seek the arrest and revocation of Evenson's probation under Rule *27.5(a).*

The Arizona State Legislature, under the U.S. and Arizona Constitutions[1], is constitutionally precluded from

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[1] In analyzing the additional layer of constitutional protection provided by the Arizona Constitution, Justice Stanley Feldman and David L. Abney, Esq., wrote "[W]e should never allow federal guarantees to supplant the provisions of our state constitution. If we choose to follow the federal precedent to bolster nationwide conformity, we destroy the "double security" designed to protect our citizens. Chief Justice Stanley G. Feldman & David L. Abney, The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution, 2OAriz. St. L.,J. 115, 117 (1988) (emphasis added).

Article 2, Section 6 of the Arizona Constitution provides: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.' The Arizona Constitution

criminalizing the publication and sale of an adult oriented newspaper from a coin operated news rack under the speculative assumption, with no documented demonstrable evidence, that it "may" fall into the hands of children." As the Supreme Court said in *Ashcroft v. Free Speech Coalition,*

> "The Government cannot ban speech fit for adults simply because it may fall into the hands of children."

II. EVEN IN "CONTENT NEUTRAL" CASES INVOLVING MUNICIPAL ORDINANCES, WHERE THE STANDARD OF REVIEW IS ONLY "INTERMEDIATE SCRUTINY," THE UNITED STATES SUPREME COURT HAS REQUIRED CONTENT NEUTRAL ORDINANCES TO HAVE STRONG, COMPELLING STUDIES SUPPORTING THE ORDINANCES FOR SUCH ORDINANCES TO PASS CONSTITUTIONAL MUSTER. A UNITED STATES SUPREME COURT DECISION WITHIN THE PAST WEEK RECONFIRMS THE REQUIREMENT THAT STATUTES RESTRICTING SPEECH MUST BE BASED UPON RELIABLE STUDIES AND NOT MERE SPECULATION.

Petitioner and Respondent, in prior court briefs, agreed that A.R.S. § 13-3513 is a "content based" law, and

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clearly envisions Evenson's rights to publish on any subject. The legislative attempt to stifle free speech and free press under the ominous threat of criminal prosecution for hypothetical, imaginary harms to minors should be rejected as violative of our Arizona Constitution.

that, unlike the normal presumptions favoring constitutionality of statutes, agreed that appellee has the compelling burden of proving the constitutionality of a statute which is presumptively invalid. (Appellee s answering brief filed with Court of Appeals, p. 10.) The standard for review is clear --'strict scrutiny".

The necessity for documented government studies to support even content neutral ordinances was recently reaffirmed in the case of *City of Los Angeles* v. *Alameda Books, Inc., 535* U.S. _____ (2002), decided May 13, 2002. In the Alameda case, the City of Los Angeles enacted an ordinance prohibiting adult entertainment enterprises from existing within 1,000 feet of each other, or within 500 feet from religious institutions, schools, or public parks. As support for the ordinance, the City Council had relied upon a Los Angeles Police Department ten-year study, which concluded that crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments, than the city as a whole. When Alameda Books was cited for a violation of the ordinance, they filed under 42 U.S.C. § 1983, seeking declaratory and injunctive relief from enforcement of the ordinance. The city had lost on motions for summary judgment in both the District court and before the 9th circuit. The United States Supreme Court reversed the 9th circuits holding which had granted summary judgment to Alameda Books. The court held

> we find that reducing crime is a substantial government interest and that the police department report's conclusions regarding crime patterns may reasonably he relied upon to overcome summary judgment against the city ... (Emp. added)

In reviewing the majority opinion, concurring opinions, and dissenting opinions, there was a consensus on

one critical principle among all nine justices — that before a content neutral statute affecting speech could be enforced, there had to be *factual studies* and a *substantial government interest* supported by clear and compelling evidence before even a content-neutral ordinance would be upheld as constitutional. The key element which divided the United States Supreme coui~t in *Alameda Books* was whether the Los Angeles police study had contemplated and covered the precise harm addressed by the ordinance. Justice Souter, in his dissent, addressed the type of studies governments must conduct to sustain even content-neutral statutes.

> "These harms can be shown by police reports, crime statistics, and studies of market value, all of which are within a municipality capacity or available from the distil led experiences of comparable communities. *See, e.g., Renton, supra,* at *51; Young, supra,* at *55.* And precisely because this sort of evidence is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction ... The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. See, *e.g., Schad v. Mount Ephraim,* 452 U.S. 61, 72-74 (1981).

That is precisely the area where the legislature failed the U.S. and Arizona Constitutions in this case. The

legislature was presented no police reports or crime statistics to show minors were accessing coin operated news racks. There were no parental complaints, no incident reports, no school complaints, no surveillance studies, no hidden cameras. Despite 33 years of similar weekly publications, not a single minor or parent stepped forward complaining about youth accessing the news racks.

How can the Appellee, on one hand, concede that it carries a heavy burden to show "harms...(that) are real" and claim that A.R.S. §13-3513 is a "regulation (which) ... in fact alleviate(s) them to a material degree" (Answering Brief. Court of Appeals, p. 10, lines 13-14) yet, on the other hand, claim that the state need not prove that significant numbers or any minors, have accessed news racks thereby justifying the creation of this statute?

United States v. Playboy Entertainment Group, Inc., supra, not only required that the government identify a genuine problem under that content-based legislation, but insisted that the targeted harm, once identified, had to be substantial.

The District Court's thorough discussion exposes a central weakness in the Government's proof: There is little hard evidence of how widespread or how serious the problem of signal bleed is.

In Evenson, there is no evidence, absolutely none, suggesting that there was ever a problem with minors accessing *The Beat* from coin operated news racks. When a unanimous United States Supreme Court has mandated that content-neutral legislation, viewed under the lesser "intermediate scrutiny" standard, be carefully supported with factual studies and findings which demonstrate and justify governmental action affecting indirect speech, the significantly higher burden on content-based statutes must

be convincingly and decisively met. As Justice O'Connor, writing for the plurality, noted in the *Alameda* decision:

> This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. (Emp. added)

III. A RELATED STATUTE, A.R.S. § 13-3506.01, WHICH MADE IT A CRIME TO FURNISH MATERIAL OVER THE INTERNET WHICH WAS DEEMED "HARMFUL TO MINORS," WAS RECENTLY DECLARED UNCONSTITUTIONAL BY THE HONORABLE ALBERTO MARQUEZ, U.S. DISTRICT JUDGE FROM TUCSON

In 2000, three years after the enactment of A.R.S. § 13 3513, the Arizona legislature enacted a similar statute, which made it a Class 4 felony to knowingly furnish material over the internet which was deemed "harmful to minors." In August 2000, a complaint was filed in the U.S. District Court for the District of Arizona (Tucson Division) challenging the Arizona harmful to minors Internet statute *(ACLU v. Napolitano, formerly ACLU v. Hull).* On January 30,2001, Judge Marquez issued an order, consented to by the plaintiffs and the Attorney General of Arizona, staying enforcement of Arizona's harmful to minors law for material disseminated on the Internet pending the judge's ruling on plaintiffs' application for a permanent injunction. On September 28, 2001, the Court granted a temporary restraining order, preventing enforcement of the challenged statute. On February 19, 2002, Judge Marquez held the Arizona harmful to minors Internet statute unconstitutional

on First Amendment, Fifth Amendment (unconstitutional vagueness) and Commerce Clause grounds. A copy of Judge Marquez's order is attached as Exhibit 1.

This particular statute nullified by Judge Marquez is significantly superior from a Constitutional standpoint to the statute being challenged before this court. In *Napolitano, a* showing had to be made that the defendant was *knowingly* selling materials to minors that was "harmful" and knew that the transmission of the item was actually going to *a* minor and knowing that the minor would receive the item. Judge Marquez's minute entry reflects *a* systematic condemnation of the sister statute. Unlike A.R.S. §13-3506.01, A.R.S. § 13-3513 imposes no requirement of knowledge or intent that *a* minor is accessing, or has ever accessed, coin operated newspaper racks.

IV. THE UNITED STATES SUPREME COURT RECENTLY DECIDED AN INTERNET SPEECH CASE ENTITLED *ASHCROFT vs. AMERICAN CIVIL LIBERTIES UNION* WHICH FIELD THAT WHERE FEDERAL LEGISLATION RELIES ON COMMUNITY STANDARDS TO DEFINE WHAT WAS HARMFUL TO MINORS," THIS STANDARD, BY ITSELF, DID NOT RENDER A STATUTE "OVERBROAD" FOR FIRST AMENDMENT PURPOSES.

On May 13, 2002, the United States Supreme Court handed down its decision in *Ashcroft* v. *American CivilLiberties Union, 535* U.S. _____ (2002). The decision, as acknowledged by the majority, is very narrow in its scope.

> "This case presents the narrow question whether the Child Online Protection Act's

> (COPA or Act) use of 'community standards' to identify 'material that is harmful to minors' violates the First Amendment. We hold that this aspect of COPA does not render the statute facially unconstitutional."

In the original hearing within the Federal District Court, the trial judge, in striking down COPA, had analyzed and decided the following issues:

> "...the definition of commercial purposes: whether the breath of the forms of content covered by COPA could have been more narrowly tailored; whether the affirmative defenses impose too great a burden on the Web publishers or whether those affirmative defenses should have been included as elements of the crime itself; whether COPA's inclusion of criminal as well as civil penalties was excessive: whether COPA is designed to include communications made in chat rooms, discussion groups and links to other Web sites; whether the government is entitled to restrict communalizations when children will continue to be able to access foreign Web sites and other sources of material that is harmful to them; what taken as a whole' should mean in the context of the Web and the Internet; or whether the statute's failure to distinguish between material that is harmful to a six year old versus a sixteen year old is problematic." See 31 F. Supp. 2d 473; See also 217 F. 3d 162 (3rd Cir. 2000 - Footnote 19).

The 3rd Circuit, in reviewing that decision, completely disregarded that detailed analysis by the District Court judge and decided the case on a ground that was not relied upon by the District Court and was "virtually ignored by the parties and the amicus in their respective briefs." *Ashcroft v. American Civil Liberties Union, supra.* This recent Supreme Court decision should have very little impact on the case pending review by this court, and is cited only because of the harmful to minor's" analysis. As the court itself conceded:

> "The scope of our decision today is quiet limited.. We hold only that COPA's reliance on community standards to identify material that is harmful to minors' does not by itself render the statute substantiaHy overbroad for purposes of the First Amendment. We do not express any view as to whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the District Court colTectly concluded that the statute likely will not survive strict scrutiny analysis once adjudication of the case is completed below."

The fatal defects cited in the Petitioner in his Opening and Reply briefs and in the Petition for Review remain unaffected by this narrow decision. A.R.S. § 13:3513 remains unconstitutionally vague, with no 5th Amendment Due Process standards to uuide Evenson in the publication of his newspaper. Indeed, A.R.S. § 13:35 13, like the District Court noted in *Ashcroft v. ACLU,* fails to distinguish between material that is harmful to a six year

old versus a sixteen year old, and thus suffers from substantial overbreadth.

V. A.R.S. § 13-3513 IMPOSES CONSTITUTIONALLY DEFECTIVE CLASSIFICATIONS BY TARGETING ONLY "COIN OPERATED" VENDING MACHINES.

The classification of A.R.S. § 13-3513 is fatally flawed by an irrational classification that ties criminality to "coin operated" machines. The absurdity of this classification is patently evident, yielding absurd results. It would not have been a crime for Mr. Evenson to give away his newspaper from open newspaper racks used by newspapers like the *New Times*. The dissemination of his newspaper only becomes a crime because, among other things, he requires the purchaser to deposit 50c in a coin-operated machine. This classification is illogical and patently unconstitutional.

If the Arizona State Legislature was genuinely seeking to prohibit minors from gaming access to "The Beat," inducing Mr. Evenson to give away his newspaper in non-coin operated news racks would dramatically increase the risk of the paper ending up in the hands of minors. If it was free, a minor could simply walk up and take one from the news rack. Being locked in a display case that mechanically will not open without a deposit of 50¢ *excludes* all minors except those with two quarters who might choose to hypothetically purchase any particular issue.

Why should a publisher who creates a paper solely for distribution to adults be subject to prosecution if he sells that material for 50¢, but not be prosecutable if he chooses to give it away from a non-coin operated news rack? If the

newspaper was genuinely harmful to minors, it would be just as harmful if they paid 5O¢ *as* it would be if they received it for free, and far more accessible. Indeed, the 5O¢ price might just deter a minor from acquiring the paper. This legislative classification is arbitrary, illogical, and unconstitutional.

VI. A.R.S. § 13-3513 IS FATALLY FLAWED BECAUSE OF THE STATE'S COMPLETE FAILURE TO ESTABLISH THAT THE LEGISLATION ADOPTED THE "LEAST RESTRICTIVE MEANS."

To sustain A.R.S. § 13-3513, the state must demonstrate that the legislation not only attacked a demonstrable genuine harm, but that it further accomplished this objective "by the least restrictive means." As previously noted, the government has never demonstrated that the news racks pose any harm to minors, nor have they shown that minors are purchasing, or have any interest in the newspaper. Without first establishing the existence of a "harm" that needs to be protected by statute, the state is unable to get to the issue of "less restrictive means."

The burden of proving "less restrictive means" rests with the state. The state's own ineptitude in gathering facts to demonstrate a "real harm" has made it *impossible* for *tile state* to prove whether or not there is a less restrictive means to protect minors. If the state had done a minimal job in investigating appellant, they may well have found that the elimination of news racks to be totally unnecessary because of a total lack of interest by youth. Even assuming for purposes of argument that a thorough investigation found significant usage at five of 200 racks, elimination of news racks at certain limited locations would be a "less restrictive" remedy than the globally annihilating

legislation that virtually guts petitioner's ability to market his newspapers.

There is a "less restrictive" means already available to the state in the criminal code which the state failed to address when implementing this legislation. A.R.S. § 1 3-3506 already makes it a crime for any person to offer or furnish harmful materials to minors. A.R.S. § 1*3-3507* makes it a crime to place material "harmful to minors" on public display in newsstands, vending machines or display racks. These laws have been on the books since the early 1970's and have undergone numerous amendments. There has never been any showing, at the legislature or at the trial level, that these laws were ineffective in preventing minors from accessing news racks. The burden rests with the state to show that newspapers "harmful to minors" are actually getting into their hands, thereby demonstrating that A.R.S. § § 1 3-3506 and 13-3507 are ineffective. The only evidence at trial from police officials suggested that the earlier laws were working since no police witness had ever received a complaint that minors were in possession of *Beat* newspapers.

> When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals. *U.S. vs. Playboy* at 1888.

The appellee has failed to sustain its burden by overcoming these less restrictive alternatives and, as a result, the statute must fail.

CONCLUSION

The Beat newspaper has the same sweeping iights to constitutional protection as the Arizona Republic, KPNX, the Tribune newspapers, the *New Times* or other main stream media. The petitioners limited audience of single and divorced adults have a right to this adult newspaper. For the reasons stated in the Petition for Review, and in this Supplemental Memorandum, this statute must be stricken for its affront to the United States and Arizona Constitutions and convictions and fines.

RESPECTFULLY SUBMITTED this ____ day of May, 2002.

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ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, vs. JEROME HENRY EVENSON, Appellant.	CR-01-0438-PR COURT OF APPEALS 1 CA CR 00-0621 MARICOPA COUNTY SUPERIOR COURT NO. CR-97-09901

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Arizona Legislature required to engage in evidentiary fact-finding before enacting A.R.S. § 13—3513, a statute affecting free speech rights, when the First Amendment to the United States Constitution has no such requirement?

2. Does A.R.S. § *13—3513* violate the First Amendment, when it places no cognizable restrictions on adults' access to adult publications such as THE BEAT?

3. Did the trial court's imposition of fines on Appellant for his conviction for multiple felonies violate the First Amendment, when the fines did not constitute a restraint on his free speech rights, but were merely punishment for his criminal conduct?

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STATEMENT OF THE CASE

On April 23, 2002, this Court granted review of the court of appeals' opinion in this case regarding issues of the constitutionality of A.R.S. § 13—35 13 and the fines imposed as punishment for Appellant's 13 violations of the statute. This Court invited supplemental briefing, and Appellee files this brief pursuant to this Court's order.

ARGUMENTS

I

THE ARIZONA LEGISLATURE WAS NOT REQUIRED TO ENGAGE IN EVIDENTIARY FACT-FINDING BEFORE ENACTING A.R.S. § 13-3513, A STATUTE AFFECTING FREE SPEECH RIGHTS, BECAUSE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION HAS NO SUCH REQUIREMENT.

Appellant has contended throughout this case that A.R.S. § *13—3513* violates his First Amendment rights because the Arizona Legislature had no evidentiary basis to enact a statute requiring him—as a publisher of material harmful to children—to sell his publication through vending machines only if the machines are inaccessible to children. Appellant claims that the fact that he placed his vending machines in residential neighborhoods, near schools, churches, convenience stores, and restaurants—places frequently visited by children—is not enough justification for the statute. The Legislature, Appellant urges, must have received proof that children actually saw such publications before it could enact § 13—35 13.

The First Amendment, however, does not support Appellant's argument. A state may constitutionally regulate speech based on its content, as long as the State has a "compelling interest" in doing so, and the re~u1ation is the least restrictive means to further that interest. *Sable Communications of California, Inc. v. FCC,* 492 U.S. 115, 126, 109 5. Ct. 2829 (1989). The State must demonstrate that the harm it seeks to remedy is real and that the regulation will in fact alleviate it to a material degree. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527* U.S. 173, 183,119 S. Ct. 1923 (1999). But

nothing requires a state legislature to engage in any kind of evidentiary fact-finding, as Appellant demands. The United States Supreme Court has held that it has allowed states:

> to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense.

Florida Barv. Went For It, Inc., 515 U.S. 618, 628, 115 S. Ct. 2371 (1995) (citation and internal quotation marks omitted), quoted favorably in *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, *555,* 121 S. Ct. 2404 (2001); *accord Burson v. Freeman,* 504 U.S. 191,211, ll2 S.Ct. 1846(1992); *Crawford* V. Lungren, 96F.3d380, 386 (9th Cir. 1996); *Upper Midwest Booksellers Ass'n. v. Minneapolis,* 780 F.2d 1389, 1396 (8th Cir. *1985)* (rejecting claim that empirical basis was necessary to enact ordinance affecting speech rights); *see also FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315, 113 S. Ct. 2096 (1993) ("a legislative choice is not subject to courtroom fact-finding"). "We do not demand of legislatures scientifically certain criteria of legislation." *Ginsberg v. New York,* 390 U.S. 629, 642—43, 88 5. Ct. 1274 (1968) (citation and internal quotation marks omitted).

The United States Supreme Court's decisions in *Ginsberg* and *Burson* are instructive on this point. In *Ginsberg,* New York prohibited the selling to minors material harmful to minors but not obscene as to adults. 390 U.S. at 631-34. The state le2islature did so because it found that material harmful to minors was "impairing the ethical and moral development of our youth." 390 U.S. at 641. The Supreme Court noted that "[i]t is very doubtful that this finding expresses an accepted scientific fact." *Id.*

The Supreme Court further noted that no consensus had been reached whether a causal link existed between the ethical and moral development of children and their exposure to obscene material. 390 U.S. at 641-42. Nevertheless, because the question had not yet been definitively answered, the Supreme Court held that the legislature had a sufficient basis to prohibit minors from having access to the material at issue:

> We therefore cannot say that [New York's statute], in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.

390 U.S. at 642.

In *Burson,* the Tennessee Legislature prohibited the solicitation of votes within 100 feet of the entrance to polling places. 504 U.S. at 205-06. A political candidate contended that this prohibition violated her free speech rights. 504 U.S. at 195. The Supreme Court analyzed the statute under strict scrutiny, requiring Tennessee to show that it had a compelling interest in the statute and that the statute was the least restrictive means of achieving the state's interest. 504 U.S. at 198. The majority of the Supreme Court found that Tennessee had compelling interests in protecting its citizens' right to vote freely and in maintaining the integrity and reliability of its elections, and it found that the 100-foot solicitation ban was necessary to achieve those interests. 506 U.S. at 196-206.

The dissenting justices, however, took Tennessee to task for the "exceptional" thinness of the evidence that the solicitation ban was necessary to guarantee the right to vote freely and to maintain the reliability of state elections. *506* U.S. at 219(Stevens, J., dissenting). They bemoaned the lack of legislative or judicial fact-finding on the necessity

of such a ban. 506 U.S. at 219-20. But the majority rejected the notion that such evidence and fact-finding were necessary to determine whether the solicitation ban was the least restrictive means of achieving Tennessee's interests. 506 U.S. at 208-09. The majority reviewed the history of election regulation and the fact that most states had also enacted similar solicitation bans, and declared that "A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right." 506 U.S. at 211.

These cases illustrate that, even in the heightened-scrutiny area of speech regulation, "simple common sense" is not disregarded. New York banned the sale to minors of materials harmful to minors because its legislature rationally believed —without scientific or evidentiary support—that exposing children to sexually-explicit material was harmful to their ethical and moral development. Tennessee banned political solicitation within 100 feet of the entrance to a polling place because its legislature rationally believed—again without any empirical studies or analyses—that keeping campaign solicitors that far away from polling places was essential to guarantee free and reliable elections. Common sense can and should prevail even in the rarified atmosphere of First Amendment law.

In this case, the Arizona Legislature learned that adult publications similar to THE BEAT—sexually-oriented material harmful to minors—were available for sale for a mere 50 cents in vending machines placed in residential neighborhoods and near schools, churches, convenience stores, and restaurants. (Opinion, filed Oct. 30,2001, at ¶ 7.) The placement of these vending machines in areas where children are permitted, invited and even, in the case of schools, required to be present, combined with the

publication's nominal cost and inherent illicit attraction to children, gave rise to a common-sense determination that children were at great risk of being exposed to this harmful material. One vending machine near a high school was sold out when the police seized it. *(Id.)* As a result of this common sense determination, the Legislature, mindful that adults had a constitutional right to purchase publications such as THE BEAT, enacted § 13—35 13 to prevent children from having access to the vending machines. No extensive fact-finding inquiry was needed to come to the conclusion that children were at risk of being exposed to harmful material, or to devise a way of eliminating that risk.

Appellant continues to rely on the United States Supreme Court's decision in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878 (2000) for his contention that the Legislature must have had evidence that a child was actually exposed to *The Beat* before enacting § *13—35* 13. But, as the court of appeals explained in its opinion, the Supreme Court's decision in *Playboy* did not turn on whether actual children saw sexually-explicit television images because of signal-bleed, but on whether the federal statute requiring cable operators to limit the transmission hours of sexually-explicit programming was the least restrictive means of achieving its goal of protecting children from signal bleed. *Playboy.* 529 U.S. at 806. (Opinion. *supra,* at ¶¶91 16, 19.) The decision could not have depended on whether actual children were exposed to the sexually-explicit programming, because, again as the court of appeals noted, the record in that case contained evidence that a child was actually exposed to sexually-explicit programming. (Opinion, *supra,* at ¶ 21.)

The Supreme Court in *Playboy* did discuss the deficiencies in Congress' proof that it had a compelling governmental interest in protecting children from signal

bleed, but this discussion reinforces that the Arizona Legislature had a compelling interest in enacting ¶ 13-3513. The Supreme Court noted that the anecdotal evidence presented in the case was insufficient because it did not adequately demonstrate the "true nature and extent of the risk" that children were exposed to signal bleed. *Playboy, 529* U.S. at 819—22. Congress had failed to prove that signal bleed had occurred often enough and with enough clarity to create a substantial risk that children would be exposed to the broadcast pornography. (Opinion, *supra,* at ¶ 20.) In the case of § 13-3513, by contrast, the circumstances show a real risk of harm to children. The vending machines are placed throughout the Phoenix metropolitan area, in residential neighborhoods, near schools, churches, restaurants, and convenience stores, and the cost to purchase *The Beat* is a mere 50 cents. (Opinion, *supra,* § 23.) The risk that children will be exposed to the harmful material in *The Beat* is real.

Appellant may also rely on the recent United States Supreme Court decision in *Ashcroft v. Free Speech Coalition,* 122 S. Ct. 1389 (2002). In that case, the United States Supreme Court held that a federal statute that prohibited "virtual child pornography" violated the First Amendment, because no proof existed that actual children were participating and were harmed by the virtual pornography. 122 S. Ct. at 1396. But the issue in *Free Speech Coalition* is completely different than the issue in this case. Child pornography may be banned without violating the First Amendment, even when it is not obscene, because states have a compelling interest in preventing sexual abuse of children, who are exploited to produce the pornography. 122 S. Ct. at 1396, 1399, 1401. Unlike traditional child pornography, "virtual child pornography" involves the manipulation of computer-generated images of children, but not necessarily actual children. 122 S. Ct. at 1397. Consequently, the Court held,

the First Amendment protects such speech to the extent no actual children are exploited. 122 S. Ct. at 1402.

As is evident, the existence of actual children harmed by child pornography was essential to the inquiry in *Free Speech Coalition* because, without the exploitation of actual children, the material in question was protected by the First Amendment and could not be prohibited. But that is an entirely different question than the one posed in the instant case, whether the Legislature identified a real risk that children would be exposed to sexually-explicit material sold through vending machines, which would justify requiring publishers to prevent minors from freely accessing the material. The answer to this question is that, considering that the vending machines were in areas teeming with children, that the cost of THE BEAT—50 cents—was well within the means of most children, and that THE BEAT inherently oozes an illicit attraction to curious children, the Legislature common-sensically determined that a real risk of exposure existed, and that § 13-3513 was the least restrictive way to eliminate that risk. The First Amendment did not require the Legislature to do more.

II

A.R.S. § *13-3513* DOES NOT VIOLATE THE FIRST AMENDMENT, BECAUSE IT PLACES NO COGNIZABLE RESTRICTIONS ON ADULTS' ACCESS TO ADULT PUBLICATIONS SUCH AS *THE BEAT.*

Appellant has spent many a page in briefing arguing that § 13—35 13 violates his First Amendment rights because the Legislature had no justification for it, and Appellee has likewise written extensively that the Legislature was justified in doing so and that § 13—3513

was the least restrictive means to achieve the Legislature's goals. In this legal debate, however, it is easy to forget the practical effect of the statute: Appellant can continue to sell THE BEAT through vending machines in public places where children abound, and adults are free to purchase the publication, as long as he retrofits the vending machines with a token or access card system, at a one-time cost of approximately $90 per vending machine. (Opinion, *supra,* at ¶ 29.) Section 13—35 13 does not deny Appellant his First Amendment right to sell his publication to adults, and it does not deny adults their First Amendment right to buy the publication.

Appellant's analysis relies heavily on *Playboy* and *Reno v. American Civil Liberties Union,* 521 U.S. 844, 1178. Ct. 2329 (1997). But the statutory restrictions in those cases not only denied children access to material improper for them, they denied adults access to material that they had a First Amendment right to obtain. In *Playboy,* cable television programmers were effectively prohibited from showing sexually-explicit programming except during certain hours at night, limiting adults' access to the programming. 529 U.S. at 805-06. In *Reno,* internet users were prohibited from transmitting "patently offensive" material in a manner available to minors, or "obscene or indecent messages" to minors. *521* U.S. at 859-60. Because internet users had no technological way of ensuring that minors would not receive or intercept an internet transmission, "a large amount of speech that adults have a constitutional right to receive and address to one another" was unconstitutionally suppressed. 521 U.S. at 874.

But nothing of the sort occurs with § 13-35 13. The statute provides adults complete access to THE BEAT in the vending machines, and denies access only to children. Section 13—35 13 acts much like display statutes that

require that pornographic magazines be sold with opaque coverings, sold behind the counter, or be placed behind "blinder racks." *See, e.g.*, A.R.S. § 13-3507 (Arizona's display statute). These statutes do not violate the First Amendment because, while they protect minors from exposure to sexually-explicit material harmful to them, they allow adults free access to the material. *See, e.g. Upper Midwest Booksellers,* 780 F.2d at 1395; *M.S. News v. Casado,* 721 F.2d 1281, 1288 (10th Cir. 1983); *Davis Kidd Booksellers v. McWherter,* 866 S.W. 2d 520, 527 (Tenn. 1993); *Berry v. City of Santa Barbara,* 47 Cal. Rptr. 661, 668 (Cal. App. 1995); *American Booksellers Ass 'n v. Rendell,* 481 A.2d 919, 941-42 (Pa. Super. 1984); *see also Lorillard,* 533 U.S. at 569-70 (display restrictions on tobacco products do not violate First Amendment). Although these statutes require adults to take an additional step to peruse or buy sexually-explicit material, such as consulting store personnel, these "restrictions" are incidental and constitutionally insignificant. *Upper Midwest Booksellers,* 780 F.2d at 1395; *M.S. News,* 721. F.2d at 1288; *Davis-Kidd Booksellers,* 866 at 528; *Berry, 47* Cal. Rptr. at 668; *Rendell,* 481 A.2d at 941-42; *see also Lorillard* (necessity of consulting store personnel does not impede exercise of First Amendment rights).

Section 13-3513 is nothing more than a display statute particularly applicable to vending machines. Before an adult may purchase a copy of THE BEAT, he must obtain a token to operate the machine. While this may be somewhat inconvenient to some customers, it is the least restrictive means to achieve the State's interest in protecting children from this obscene-as-to-children material. Any decrease in sales Appellant may suffer because his clientele are not sufficiently determined to go the extra step to buy THE BEAT is not constitutionally cognizable:

> The fact that sales of the publication may decline

> when blinder racks are in place does not mean that the ordinance unreasonable restricts adult access to these materials. The First Amendment is not a sword to enhance marketing tactics. Nor is it a shield for peddlers of erotica to expose their wares to minors.

Berry, 47 Cal. Rptr. at 668. Section 13—3513 impedes no one s First Amendment rights.

III

THE TRIAL COURT'S IMPOSITION OF FINES ON APPELLANT FOR HIS CONVICTION FOR MULTIPLE FELONIES DID NOT VIOLATE THE FIRST AMENDMENT, BECAUSE THE FINES DID NOT CONSTITUTE A RESTRAINT ON HIS FREE SPEECH RIGHTS, BUT WERE MERELY PUNISHMENT FOR HIS CRIMINAL CONDUCT.

Appellant contends that the trial court's imposition of a fine of $8,000 per conviction was excessive in violation of the Eighth Amendment to the United States Constitution, and violated his First Amendment rights as well. Appellee adequately addressed the Eighth Amendment claim in its answering brief and response to the petition for review and will not repeat here the analysis showing that the fines were not excessive. In considering Appellant's claims that the fines violate his First Amendment rights, it is clear that the fines are constitutional.

Imposition of fines for criminal conduct involving speech does not violate the First Amendment. *Alexander v. United States,* 509 U.S. *544, 555,* 113 S. Ct. 2766 *(1993);Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 705-07, 1068. Ct. 3172 (1986). As long as the fine constitutes punishment for past conduct and not prior restraint for future speech, the interests of the First Amendment are not implicated. *Alexander,* 509 U.S. at *55 1-55.* The size of the fine is irrelevant for First Amendment purposes. *See Arcara, 509* U.S. at *705-07* (forfeiture of assets closed bookstore; no First Amendment concern). Although fines may "chill" future speech, this is an accepted consequence to allowing states to regulate the publication of obscenity. *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 60, 109 S. Ct. 916 (1989). "The mere assertion of some possible self-censorship resulting from a statute is not enough to render an antiobscenity law unconstitutional under our precedents." *Id.*

As explained in Appellee's answering brief, the fines imposed on Appellant are not excessive and in no way threaten his publication business. The fines were merely $8,000 per conviction, and the trial court allowed Appellant to pay the fines in installments of $2,500 per month. (R.T. 8/23/00, at 40.) Considering that Appellant receives $17,000 in advertising revenue per month, he should have the wherewithal to pay the installment. The fines were not excessive and do not violate the First and Eighth Amendments.

CONCLUSION

As the court of appeals correctly determined in its opinion in this case, Appellant's convictions and sentences do not violate the First or Eighth Amendment to the United States Constitution. Therefore, this Court should deny review as improvidently granted, or, if this Court remains inclined to address these issues for itself, affirm the decision of the court of appeals and Appellant's convictions and sentences.

Respectfully submitted,

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RANDALL M. HOWE

ARIZONA SUPREME COURT

THE STATE OF ARIZONA,

Appellee,

vs.

JEROME HENRY EVENSON,

Appellant.

No. CR 01-0438-PR

Court of Appeals
No. 1 CA-CR 00-0621

Maricopa County Superior
Court No. CR 97-09901

BRIEF OF *AMICUS CURIA*

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ARGUMENT

A jury found Appellant Evenson guilty of thirteen counts of displaying, selling, or offering to sell from a vending machine material that is harmful to minors in violation of A.R.S. § 13-3513, and the trial court placed him on probation for three years and imposed an $8,000 fine (plus surcharges) on each count. In an opinion and a memorandum decision filed on October 30, 2001, the Court of Appeals affirmed. (Petition for Review, Exhibits A and B.) Evenson then filed a petition for review. By order filed April 25, 2002, this Court granted review as to four of Evenson's issues and allowed the parties to file supplemental briefs. The Maricopa County Attorney's Office submits this *amicus curiae* brief with respect to Issues A and B of the petition for review.

Evenson's complaint is that A.R.S. § 13-3513 is unconstitutional because it violates his First Amendment right to free speech. In Issues A and B of his petition for review, Evenson maintains that the Arizona Legislature was constitutionally required to conduct hearings and receive evidence before enacting the statute, and that his convictions cannot stand absent evidence that any minor has ever viewed, purchased or been exposed to his publication. For the following reasons, the Maricopa County Attorney's Office submits that Evenson's positions do not merit overturning the decisions of the Court of Appeals.

Before addressing Issues A and B, it is important to recognize that the restriction on speech imposed by A.R.S. § 13-3513 is slight. The statute provides that if a person is going to sell material that is harmful to minors from vending machines located in public places that are open to minors, he must take reasonable steps to keep the material away from minors. Unlike the statute at issue in *United*

States v. Playboy Entertainment Group, 529 U.S. 803, 806-07 (2000), Arizona's statute does not effectively bar adults from access to sexually explicit material for two-thirds of every day. Arizona's statute also does not effectively suppress a significant amount of speech that adults have a constitutional right to receive and to address to one another. *Compare Reno v. American Civil Liberties Union,* 521 U.S. 844, 874 (1997). It does not impose a total ban on adult access to indecent communications. *See Sable Communications of California, Inc. v. FCC,* 492 U.S. 115, 117 (1989). Under Arizona's statute, any adult can obtain Evenson's publication at any time by simply using a token.

Evenson's position that the legislature must hold evidentiary hearings before it enacts a statute regulating constitutionally protected speech is not supported by logic or caselaw. To begin with, imposition of such a requirement on lawmakers would constitute an impermissible judicial encroachment upon the legislative branch. The Supreme Court has rejected just such a notion in a case that raised an equal protection challenge to a statute, stating that "we never require a legislature to articulate its reasons for enacting a statute", and that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993).

With regard to the First Amendment and legislation affecting protected speech, the Supreme Court has held that such legislation is permissible, and has required only that it be designed to promote a compelling interest[1] and that it

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[1] The Supreme Court has acknowledged that government has a compelling in interest in shielding minors from the influence of literature that is not obscene by adult standards. *See Sable Communications of California v. FCC,* 492 U.S. at 126; *Ginsberg v.*

adopt the least restrictive means to further that interest. *Sable Communications of California, Inc. v. FCC,* 492 U.S. at 126. In his concurring opinion in that case, Justice Scalia rejected the notion that this type of legislation is valid only if based on some sort of legislative fact-finding process: "Neither due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote." 492 U.S. at 133 (Scalia, J., concurring). Further support for this position can be found in *Burson v. Freeman,* 504 U.S. 191 *(1991),* a case that examined a state statute prohibiting solicitation of votes and display of campaign materials within 100 feet of the entrances to polling places. The Supreme Court upheld the statute against a First Amendment challenge, noting that "[a] long history, a substantial consensus, and simple common sense were sufficient to establish the need for a restricted zone around polling places. 504 U.S. at 211. *See also Ginsberg v. New York,* 390 U.S. 629, 642-643 (1968) (legislatures need not implement "scientifically certain criteria of legislation"). These cases constitute a clear statement that the legislative fact-finding burden that Evenson proposes is not constitutionally required.

New York, 390 U.S. 629, 639-640 (1968).

CONCLUSION

For the reasons argued above and those advanced by the State in its Opposition to Petition for Review and in Appellee's Supplemental Brief, this Court should deny relief and affirm the decisions of the Court of Appeals.

Submitted June ___, 2002.

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The undersigned deputy states that the foregoing brief has been prepared in double-spaced 14-point Arial font and contains approximately 1,000 words. This deputy avows that the brief conforms to the requirements of Rule 31.13, Ariz. P. Grim. P.

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IN THE SUPREME COURT
STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff/Appellee, v. JEROME EVENSON, Defendant/Appellant/ Petitioner	NO. CR-01-0438-PR ARIZONA SUPREME COURT Court of Appeals No. CA CR 00-0621 Department B Maricopa County Superior Court Cause No. CR 97- 09901

PETITIONER/APPELLANT'S RESPONSE TO AMICUS CURIAE BRIEF OF MARICOPA COUNTY ATTORNEY'S OFFICE

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The Maricopa County Attorney's office, who litigated this precise criminal case for 3-1/2 years before transferring prosecutorial duties to the Attorney General's Office, intervenes by way of an amicus brief, raising three points:

1. The County Attorney claims that the restriction of speech arising out of A.R.S. § 13-3513 "is slight" (P. 2, L:4);

2. The County Attorney argues that there is no requirement for a legislative body to hold hearings or make factual determinations before enacting penal legislation affecting constitutionally protected speech (P. 2, L:17-20)

3. The County Attorney claims that the legislature is only required to identify a compelling governmental interest, and thereafter adopt the "least restrictive means" to further than interest. (P. 3, L:8-13). This response will address these issues in the order raised by the Amicus.

I. The Restriction Imposed by A.R.S. § 13-3513 is Not "Slight".

The County Attorney/Amicus argues that the restriction against speech caused by A.R.S. § 13-3513 is "slight." (P. 2, L:4); This conclusion has no basis in fact or law. A.R.S. § 13-3513 seeks to restrict two of the three most fundamental federal and state constitutional rights given to citizens in a free society – free speech and free press. The weapon selected for chilling these rights is the most potent and chilling in the arsenal of government powers – the criminal code. Whenever a governmental body seeks to infringe upon a constitutionally protected right using as its weapon the power of the police, such an intrusion can never be deemed "slight."

As evidenced by this precise case, the County Attorney is empowered to pursue a publisher's liberty and property with an array of class 4 felonies (one felony for each news rack or 225 felonies per week with potential fines of $1.8 million in fines per week) solely because a publisher has selected a coin operated newsrack as a means for selling his newspaper to an adult audience. On a single week in August of 1997, this Amicus filed a fifteen (15) count indictment resulting in thirteen (13) felonies and $168,000 in fines, all without any showing that any minor saw or read that particular issue, or was attracted to any of his coin operated vending machines. It is inconceivable how this Amicus can argue a conviction for thirteen felonies and fines of $168,000 is "slight."

The chilling effect on speech arising from this statute is far broader than the thirteen felonies or $168,000 in fines presently before this Court for review. This petitioner, each week, 52 weeks each year, is forced to ask himself the following questions when his constitutionally protected newspaper is placed in each of 225 news racks for purchase by his adult customers:

1. Will the County Attorney try to find something objectionable in this week's issue and seek to revoke Petitioner's probation under the lesser standard of probable cause?

2. Will the County Attorney, without any minor victims or any evidence anywhere that minors use or take an interest in petitioner's coin-operated newsracks, seek to use this same statute to bring new criminal charges? As part of the new charge, will this amicus seek to have the petitioner held without bond or argue for a high bond because of a purported commission of a "new crime" while on probation?

3. Even if petitioner wins an acquittal at some future trial, or is found not to be in violation of probation, will the legal fees and costs petitioner incurs defending new charges or probation revocation attempts effectively silence his voice and his pen by driving him out of business as a result of financial ruin?

The Amicus argues, without any analysis, that the simple cure-all for this non-demonstrable, non-existent harm to minors is to have "coin operated" vending machines converted to "token" operated vending machines. This suggestion, like its legislative predecessor, is unsupported by economic studies, feasibility studies, operational studies, historical studies, or comparative studies showing that this "token" remedy will reduce or eliminate the imaginary harm to minors. We have no clue from the legislative or judicial records or from the Amicus of any minor accessing these coin operated machines in 33 years, so how precisely does the County Attorney's remedy solve or minimize the yet unidentified harm? As the Supreme Court noted in *Butler v. Michigan*, 352 U.S. at 383, and quoted with approval in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) is this another case of "burn[ing] the house to roast the pig." Below are just a handful of questions illustrating the absurdity of the "token" proposal:

1. Where will Petitioner Evenson market his tokens so that buyers can acquire his newspaper? Does the Amicus think that drug stores or grocery stores or convenience stores will market the tokens? Indeed, how does he market or advertise the tokens in these stores?

2. Let's assume that the only distributors would be adult bookstores. Has any study been done prior to the legislation to see if adult bookstores would even be willing to market the tokens? If so, what would be their fee to market each token? What burden would be placed upon the publisher

to find these "token" outlets?

3. What effect on sales would result for adult purchasers being forced to first purchase tokens in an adult bookstore and later taking those tokens to a vending machine to buy *The Beat* newspaper? Can this Court imagine what would happen to sales of the Arizona Republic or the Tribune newspapers if readers, before purchasing a paper, had to find an adult bookstore to purchase tokens to fit the vending machine and then look for a news rack to buy the newspaper? The two-step process would be a death sentence to marketing this paper.

4. What effect would placing tokens with adult bookstores have on making newspapers accessible to adult purchasers? For example, the *Playboy* case was critical of a restriction placed upon viewers who were restricted to certain hours to view adult channels. Tokens would produce similar results upon news racks. At present, news racks are available to adult customers 24 hours a day. Since adult bookstores, by law, must be closed between 1:00 a.m. and 8:00 a.m., readers wanting to buy a paper during those hours would be precluded because of the unavailability of tokens for a particular machine.

5. How many customers, comfortable in purchasing the paper for two quarters on a street corner, would be driven away from petitioner's newspaper because of their discomfort or embarrassment in being forced to enter adult businesses to buy their tokens?

6. What type of costs would be incurred by the publisher to replace the coin operated boxes with token-operated slots? Would there me some mechanical alterations required of the machine itself? (At one point in the trial, one of the officers suggested that a token-operated device could be installed for roughly $100.00 per machine based upon a phone

call he made. [May 15, 2000 Transcript at page 122] Using that estimate, it would cost Petitioner $20,000 to $25,000 to convert coin operated machines to token-operated machines.) How can the Amicus call this expenditure "slight" when there is no clue anywhere that minors are even accessing the machines? For a small publisher, these types of costs are not small – they are enormous. Once the conversions were made, Evenson would be faced with the intolerable choice of having 225 token-operated machines with no place to market his tokens.

7. What evidence exists anywhere in any record that the tokens proposed by the legislature and the Amicus would eliminate or reduce the possibility of these unknown, non-existent minors from purchasing papers? Even at trial, a police witness admitted that tokens would not cure the hypothetical problem of a minor trying to purchase a paper. It was noted that use of slugs could bypass a token system. We read in the May 15, 2000 transcript at p. 120, Line 20 to p. 121, Line 10,

> Q. When this statute was passed, you have been asked by the prosecutor, were any type of precautions taken so that children couldn't gain access to this particular news rack, and you said no. Now, one of the areas that are our enlightened legislature provided that coins could be minted or made that would give someone access to this particular machine; right?
>
> A. Are you talking about or -- you are talking about special tokens?
>
> Q. Special token?
> A. I believe so.

Q. And as you found you could open them with something out of an electrical box, like a punch box?

A. That is correct, theoretically, anything in the size and weight of a quarter.

In *ACLU v. Reno,* 521 U.S. 844 (1997), Congress attempted to provide internet providers statutory suggestions for restricting access to minors of internet sites. These statutory suggestions included acceptable digital certificates that verified age, credit cards, debit accounts, adult access codes, all of which were unworkable. A.R.S. § 13-3513, and the Amicus, make similar feeble attempts by submitting unworkable schemes such as tokens or credit card type devices similar to ATM's. The court in *Reno* determined that the availability of these defenses "do(es) not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision. 521 U.S. at 882. Tokens don't eliminate or reduce a problem that has never been demonstrated at the legislature or in the courts. They accomplish only one objective - silence the voice of the press.

Any statute which targets content-based speech with felony criminal consequences, staggering potential fines and unworkable irrational "fix alls" where there is no established demonstrable "harm" is unconstitutional and must be stricken down.

II. Legislatures can not arbitrarily, and without factual determinations, implement legislation restricting speech under "strict scrutiny" standards imposed by our nations highest court.

The Amicus suggests that Congress and state legislatures can enact content-based criminal statutes without

any type of legislative fact finding. This contention is absurd, and flies in the face of dozens of cases which have evaluated content-based laws. In the host of content-based cases cited throughout this litigation process, each has focused on the legislative fact finding process and it's sufficiency to restricting the proscribed harm. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (Minors accessing dial-a-porn; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (Minors exposed to vulgar language over the radio); *United States v. Playboy Entertainment Group*, 529 U.S. 803, 120 S. Ct. 1878(2000) (Signal bleed depicting sexual activities on the television screens of non-cable subscribers); *Reno* v. *American Civil Liberties Union*, 521 U. S. 844,(1997) (Minors accessing obscene materials over the internet); *Cohen* v. *California*, 403 U. S. 15, 21 (1971) (Wearing crude clothing readily visible to women and children)

Legislatures cannot pass laws affecting the constitutional rights of its citizens without identifying and substantiating a significant harm.

> The burden is not satisfied by mere speculation or conjecture, rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree. (Emphasis added)

Edenfield v. Fane, 507 U.S. 761, 771(1993). *See also Board of Trustees of State*

Univ. of N.Y. v. Fox, 492 U.S. 469, 480(1989).

The Amicus claims that *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) supports the proposition that a legislature need not engage in hearings resulting in findings of fact before passing laws which infringe upon constitutionally protected rights (p. 3). The Amicus also cites a lone concurring opinion by Justice Scalia in *Sable Communications of California v. UCC,* 492 U. S. 115, 106 L.Ed.2d 93 for this proposition.

FCC v. Beach Communications involved legislation affecting social and economic policy, not first amendment rights. As the court pointed out in its opinion, policies affecting social and economic policy differ in many respects from policies relative to first amendment rights. In considering the economic issues raised in *Beach*, the court stated:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. (Emphasis added)

The court reasoned that legislation of this type, even if suspect, would eventually be corrected through democratic processes. As such, unlike "free speech" statutes, they were entitled to a *presumption of validity*.

The Constitution presumes that, absent some

> reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process, and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted ...On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity.[1]
>
> (Emphasis added)

Contrary to the Amicus argument, courts look to the legislative record in evaluating and weighing the heavy burden that the government has in content-based cases. A deficiency in the legislative history can sound the death knoll of a statute. The deficiency prompted the Supreme Court in *Playboy* to note:

> No support for the restriction can be found in the near barren legislative record relevant to this provision. Section 505 was added to the Act by floor amendment, accompanied by only brief statements, and without committee hearing or debate. See 141 Cong. Rec. 15586-15589 (1995). One of the measure's sponsors did indicate she considered time channeling to be superior to voluntary blocking, which "put[s] the burden of action on the subscriber,

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[1]. Unlike *Beach*, The United States Supreme Court noted in *Playboy* that "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. "Content-based regulations are presumptively invalid," *R. A. V.* v. *St. Paul,* 505 U. S. 377, 382 (1992), and the Government bears the burden to rebut that presumption."

> not the cable company." *Id.*, at 15587 (statement of Sen. Feinstein). This sole conclusory statement, however, tells little about the relative efficacy of voluntary blocking versus time channeling, other than offering the unhelpful, self-evident generality that voluntary measures require voluntary action. The Court has declined to rely on similar evidence before. See *Sable Communications,* 492 U. S., at 129-130 ("[A]side from conclusory statements during the debates by proponents of the bill, ... the congressional record presented to us contains no evidence as to *how* effective or ineffective the ... regulations were or might prove to be" (footnote omitted)); *Reno,* 521 U. S., at 858, and n. 24, 875-876, n. 41 (same). This is not to suggest that a 10,000 page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition. (Emp. added)

In *Sable*, Congress attempted a total ban on indecent commercial telephone communications as the only truly effective method of preventing children from gaining access to such messages. The government went so far as to urge the court to defer to the Congressional findings about the constitutionality of legislation. *Sable,* in rejecting this plea, held that

> The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First

> Amendment freedoms. (Citations Omitted) It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.
>
> To the extent that the federal parties suggest that we should defer to Congress' conclusion about an issue of constitutional law, out answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications., Inc. v. Virginia,* 435 U.S. 829, 843, 98 S. Ct 1535, 1543, 56 L. Ed 1 (1978). (Emphasis added)

The complete absence of legislative findings or evidence on whether and how selling non-obscene newspapers from coin-operated racks is fatal.

III. The State Legislature not only *failed* to identify a "real" harm to minors, but *failed* a second time by failing to adopt the least restrictive means.

The County Attorney claims that the legislature is only required to identify a compelling governmental interest, and thereafter adopt the "least restrictive means" to further than interest. (P. 3, L:8-13). The government's two step duty of first identifying a real harm and, once identified, addressing the content based issue by the "least restrictive means" has failed on both levels.

There are no police reports, school complaints, parental complaints, police investigatory evidence, lay witness testimony, or surveillance film showing or evidencing any type of harm to minors from coin operated newsracks. From sources one might expect to find such complaints (schools, parents, police reports), the record is barren. The adventures of minors into cyberspace or into "R" rated movies is everywhere, but evidence of even one child dropping 50¢ in a Beat newsrack is nowhere to be found in a 33-year history. Even the Amicus, with three police agencies working under its direction, was unable to come up with a single witness or even an anecdote. Neither parents nor police, schools or social workers, nor prosecutors or parishioners were able to document even one instance of a minor accessing the newsracks either at the Arizona legislature or in the courtroom. The legislature clearly attacked an imaginary harm with no evidence that it even existed using the criminal code as its weapon to attack under the guise of "harmful to minors."

Their secondary failure is as great as the initial harm. You can't adopt the "least restrictive means" to attack a harm when the harm itself has never been documented or identified. Do minors even walk near the news racks? Look in the news racks? Tamper with the news racks? The government cannot prove that tokens would be the "least restrictive means" of protecting minors from *The Beat* if minors are not using coins to buy the newspaper in the first place.

The fallacy of the "token" cure proposed by the Amicus has been addressed previously in this response. In short, it is unworkable, prohibitively expensive, and calculated to destroy the business of this petitioner. It's feasibility has never been studied. Other "less restrictive means" have never been examined or explored. Since we are dealing with a hypothetical harm, there are hypothetical "less

restrictive" means to address the non-existent harm. If minors actually had accessed newsracks, would a label on the newsrack "Adults Only" be less restrictive? If no minors were accessing news racks through Maricopa County, the "least restrictive alternative" would be to do nothing. If, after a through investigation, it was hypothetically discovered that minors were attracted to news racks in two of 225 locations, a less restrictive alternative would be to remove the racks at those two locations and to find two less intrusive locations. The problem with the State's case from its inception is that the government has never been able to address the second issue of "least restrictive means" because the underlying harm justifying content-based legislation has never properly been documented.

CONCLUSION

For the reasons stated herein, the arguments of the Amicus should be rejected.

RESPECTFULLY SUBMITTED this ___ day of July, 2002.

JONES, SKELTON & HOCHULI

By_____
A. Melvin McDonald, Bar No. 002298
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

A. Melvin McDonald, being first duly sworn, upon oath states that on the ___ day of July, 2002, he caused the original and six copies of the foregoing petition to be filed with:

Arizona Supreme Court
Attention: Clerk's Office
1501 West Washington, #402
Phoenix, Arizona 85007

and that he caused two copies each of the foregoing petition to be deposited on July __, 2002, in the United States Mail, postage prepaid to:

Janet Napolitano, Attorney General
Randall M. Howe, Chief Counsel
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_____
A. Melvin McDonald

SUBSCRIBED AND SWORN to before me this ___ day of July, 2002

_____
Notary Public

My Commission Expires:

_____